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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 433

CITY OF GAINESVILLE, PETITIONER,

v.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR.

BRIEF FOR PETITIONER.

CECIL MURPHY,
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(32,885)

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BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR, RESPONDENTS.

BRIEF FOR PETITIONER.

Grounds of Jurisdiction.

This suit was brought in the District Court for Cooke County, Texas, on October 11, 1921, by the City of Gainesville (a Texas municipal corporation), hereafter called the city, against the Southern Construction Company (a partnership composed of Lester Levy and Harry D. Levy, citizens of Texas), hereafter called the Construction Co.; the Southern Surety

Company (an Iowa Corporation) hereafter called the Surety Co., and H. W. Head, a citizen of Texas, residing in Grayson County, to recover exceeding $15,000 (R., 119). Default judgment was rendered by said court in favor of the plaintiff against all defendants for $15,000 and against the Construction Co. for $4,090, which judgment upon appeal by Head and the Surety Co. was reversed by the Court of Civil Appeals for the Sixth District as to Head and the Surety Co. but affirmed as to the Construction Co. (See Head *vs.* City of Gainesville, 258 S. W., 323.) Upon the remand of the suit to the District Court of Cooke County, H. O. Head as executor made himself a party in lieu of H. W. Head, who had died, and he and the Surety Co. filed an answer to the petition alleging the invalidity of the warrants. Thereupon the city amended its petition making the Brown-Crummer Investment Company (a Kansas corporation), hereafter called the Investment Co., a party defendant, and the Investment Co. within the time allowed by law filed its petition to remove the cause to the District Court of the United States for the Eastern District of Texas upon the ground of a separable controversy. After a transcript of the proceedings was filed in said court, a motion to remand, timely made by the city, was overruled. All parties recast their pleadings in the United States District Court with exception of the Construction Co., which did not appear. The Investment Co. by cross-answer sought to recover judgment against the city for exceeding $12,000 (R., 119). The case was tried in said court on the 25th day of May,

1926 (R., 123). The court directed the jury to return a verdict in favor of the Investment Co., against the city, for $13,125 with interest at the rate of 6 per cent per annum from rendition, and that the city take nothing as to H. O. Head, executor of H. W. Head, deceased, and the Surety Co. upon the causes of action asserted by the city against them. A verdict was returned and judgment entered in accordance with the instructions of the court (R., 225 and 123). The city carried the case by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, which on the 6th day of July, 1927, affirmed the judgment of the lower court (R., 294) in favor of the Investment Co. against the city, but the court being of the opinion that it was without jurisdiction of the controversy between the city and the other defendants, remanded the case as to them with directions to dismiss (R., 290 and 293). This being an action at law where the value in controversy exceeds $20 and there being evidence entitled to consideration, showing that the city had valid defenses against the cross-answer of the Investment Co., the trial court in directing a verdict against the city and the circuit court of appeals in affirming that action deprived the city of its right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States. The suit being between citizens of different States involving exceeding $12,000, the Federal court had jurisdiction and this Court has jurisdiction to review any ruling of the circuit court of appeals or of the district court deemed erroneous.

Under Section 28 of the Judicial Code, it is the suit and not the separable controversy only that is removed to the Federal court. Therefore, if there existed a separable controversy authorizing the removal of the suit, the District Court of the United States acquired jurisdiction of the entire case (Barney *vs.* Latham, 103 U. S., 205; Brooks *vs.* Clark, 119 U. S., 502; City of Beaumont *vs.* Fall, 291 S. W., 202).

Statement of the Case.

Gainesville is a Texas municipality incorporated as a city of exceeding 5,000 under a special act of the Legislature approved March 17, 1909, of which the courts take judicial notice (Special Laws of the 31st Legislature, 501 and 537) (R., 131).

On the 20th of November, 1919, a contract was signed by the city and the Construction Co. (not conceded to be valid) (R., 138) concerning some paving to be done by the Construction Co. Under the contract, the city was to pay for the street intersections and for one-fourth of the other work, while the Construction Co. looked to the abutting lot owners for the remaining three-fourths (R., 137).

It was contemplated that the city's part of the paving would amount to $50,000. The Construction Co. agreed to accept the legally issued warrants of the city at par for the city's proportion of the cost (R., 140), to be paid monthly on the first regular meeting of the council after the first day of the month, as the work progressed on the engineer's written estimates, the city reserving 10 per cent until final completion (R.,

156). The work was delayed for various causes and up to September 20, 1920, the city's part of the only paving done amounted to $3,000, for which the city, on the 6th day of April, 1920, issued three warrants numbered one, two and three, for $1,000 each (R., 251), payable in one, two and three years, respectively, which warrants were paid at maturity. On or shortly prior to September 10th, 1920, some understanding was had not shown on the record by which the city was to issue the remaining $47,000 of warrants in advance of the work. In furtherance of this understanding, H. W. Head on September 10th, 1920, signed and delivered to the city this obligation:

SHERMAN, TEXAS, September 10, 1920.

To the City Council,
Gainesville, Texas.

GENTLEMEN:

By virtue of an order from the Southern Surety Construction Company any moneys due said Southern Const. Co., from the city of Gainesville for work done and materials furnished under a contract for street improvements is to be paid to me, said amounts being payable in city warrants.

I understand it is now the purpose and intent of the City Council of Gainesville, Texas, to have issued to said Southern Const. Co. ten thousand dollars in warrants, these warrants to be properly endorsed by Southern Const. Co., and delivered to me.

In the event of any dispute, discrepancy or other contingency arising which might in any

way affect the amount of work done or materials furnished by Southern Const. Co. so as to in any way affect said ten thousand dollars in warrants I hereby agree to protect and indemnify said City of Gainesville, Texas, up to the sum of ten thousand dollars.

None of said money will be paid or credited to Southern Const. Co., except in such amounts as may be shown to be due under signature of Mayor of Gainesville, Texas, and when such amounts shall equal ten thousand dollars then this obligation to be discharged.

In case of suit arising out of the matters set out herein or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. HEAD.

This obligation was guaranteed by the Surety Co. (R., 13). On October 4, 1920, H. W. Head signed and delivered to the city an obligation precisely like the above except the warrants contemplated amounted to $37,000 (R., 15), which obligation the Surety Company guaranteed (R., 15). Thereafter, on the 21st of September, 1920, $10,000 of warrants were issued (R., 171), and on the 5th of October, 1920, $17,000 (R., 167); and on November 2, 1920, $10,000. (R., 172); and November 16, 1920, $10,000 (R., 172); making in the aggregate $47,000. These warrants were issued pursuant to resolutions of the same date.

The warrants when issued were immediately delivered to the Construction Co., and were immediately endorsed and delivered by the Construction Co. to

H. W. Head, who immediately delivered them to the Investment Co., the latter paying Head therefor 95¢ on the dollar.

Early in January, 1921, the Construction Co. again began work (R., 179) and did paving amounting to $34,736.29, including the $3,000 paid for in April, 1920 (R., 19 and 179 and 181), and quit. Thus leaving undone $15,263.71 of the $50,000 which the city had attempted to pay for in warrants (R., 19). On October 11, 1921, the city brought suit against the Construction Co., H. W. Head, and the Surety Co., in the District Court of Cooke County, Texas, to recover $15,000 of them as the difference between the paving paid for and the paving received and against the Construction Co. for $4,090 for claims against it alone (R., 119). Default judgment was rendered against all defendants for $15,000, and against the Construction Co. alone for $4,090 for other things (R., 120). This judgment was reversed upon appeal by Head and the Surety Co. upon the ground that the petition did not allege sufficient facts to support it. (Head *vs.* City of Gainesville, 254 SW., 323.)

Upon the remand of the case to the District Court for Cooke County, Texas, the defendant, Head, answered and alleged among other things that the warrants in question were illegally issued, void, and of no value (R., 120). Thereafter, on December 10, 1923, the city filed its first amended original petition making the Investment Co. a defendant, and while still alleging that the warrants constituted valid legal and binding promises and obligations of the city prayed in

case the court held otherwise, that the warrants be canceled and declared void (R., 121).

The case was next removed to the District Court of the United States for the Eastern District of Texas, upon the petition of the Investment Co. claiming that there existed in the case a separable controversy. There being no question in the trial court or in the circuit court of appeals in reference to the sufficiency of the pleadings to raise the question discussed, we believe that their substance need not be stated here. By cross answer filed May 17, 1926, the Investment Co. sought to recover judgment of the city for past due warrants 7, 8, 9, 10, 11, and 12 for $1,000 each, and on past due coupons on all of the warrants (R., 100). These warrants, while among the first maturing, were the last issued having been authorized by the resolution of November 16, 1920 (R., 172). To this cross answer, the city replied by first amended supplemental petition alleging the facts connected with the transaction and that the Investment Co. not only acquired the warrants with notice of the real facts, but devised the scheme under which they were issued (R., 102). There was no question in reference to the sufficiency of the amended supplemental petition.

The warrants were for $1,000 each, numbered one to fifty, inclusive, dated November 20, 1920, bearing interest at the rate of 6 per cent per annum from that date, payable semi-annually. Two of the warrants were payable each year to March 1, 1930, and thereafter three were payable each year. The warrants (R., 245) were in the following form:

No. ——.

UNITED STATES OF AMERICA.

STATE OF TEXAS,
County of Cooke:

City of Gainesville Street Improvement Warrants.

Series ——.

This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company Contractor, their assigns or bearer, on the 1st day of March, 19—, at the office of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of

One Thousand Dollars

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st, and March 1st of each year; and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This Warrant is one of a series of Fifty (50) inclusive, in the denomination of One Thousand

($1,000) Dollars, issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and laws of the State of Texas, and pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at page 570 et seq., of the Minutes of said City Council.

The date of this warrant, in conformity with the ordinance above mentioned, is November 20, 1919.

And It Is Hereby Certified and Recited That all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

In Witness Whereof the City of Gainesville has caused the corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor, and countersigned by its City Secretary, and registered by the City Treasurer, as of the date last above written.

E. N. BLACKBURN,
Mayor, City of Gainesville, Texas.

Countersigned:
S. A. BRYAN,
City Secretary,
City of Gainesville, Texas.

W. H. GARMANY,
City Treasurer,
City of Gainesville, Texas.

The form of the interest coupons was as follows (R., 247):

No. —. $30.

On the 1st day of March, 1920, The City Treasurer of the City of Gainesville, Texas, will pay to the Southern Construction Company, their assigns or bearer, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, the sum of Thirty ($30) Dollars, the same being six months' interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series ——, No. —, dated November 20, 1919, to which this coupon is attached and is a part thereof.

E. N. BLACKBURN,
Mayor.

S. A. BRYAN,
City Secretary.

At the time of the issuance of these warrants no work had been done. These so-called warrants are in fact bonds, and void because not authorized by the qualified tax-paying voters of Gainesville at an election held for that purpose.

Article 701 of the Revised Statutes of 1920, page 229, says:

> "The bonds of a county or an incorporated city or town shall never be issued for any purpose unless the proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property taxpayers of such county, city or town."

Section 1, Article 4 of the charter of the city says:

> "No bonds shall be issued for any purpose in excess of $2,500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting the same at the election so held" (R., 129).

The provisions of Article 701 of the statute overrides the provision of the charter authorizing the issuance of bonds to the amount of $2,500, which prohibits their issuance in any amount without the consent of the qualified taxpaying voters (City of Beaumont *vs.* Fall, 291 S. W., 202; Foster *vs.* City of Waco, 225 S. W., 1104; 113 Tex., 352; Pulte *vs.* Keel, 297 S. W., 241; Robertson *vs.* Breedlove, 61 Tex., 316; San Patricio County *vs.* McClane, 44 Tex., 392; Brenham *vs.* German American Bank, 144 U. S., 173).

Section 16, Article 9, of the Charter (R., 130), and Article 545 of the Revised Statutes in force in 1909, and now Article 1083, page 322, of the Revised Statutes of 1925, says:

"Whenever the city council shall determine to make any such improvement, they shall cause an estimate to be made of the probable cost thereof by the city engineer, or by some other officer of the city, or by a committee of three aldermen; and such engineer or other officer or committee shall also report a full list of all lots or fractional lots, giving number and size of the same, and the number of the block in which situated, and the names of the owners thereof, if known, and such other information as may be required by the city council; and if there be a lot or fractional lot the owner of which is not known, the same shall be entered on said list as unknown. The officer or committee aforesaid shall enter on said list, opposite each lot or fractional lot lying and being on each side of the street, avenue or alley so to be improved as aforesaid, one-third of the estimated expense for such work or improvement on such avenue, street or alley fronting, adjoining or opposite such lot or fractional lot; and, on the acceptance and approval of said report and list by the city council, said amount shall be imposed, levied and assessed as taxes, and shall be a lien upon the property until the payment of the same."

There is no pretense that this preliminary estimate was made or that this statute was complied with.

Section 6, Article 7, of the charter says:

"The city council shall sit with open doors, shall keep a journal of its proceedings, which shall be public and constitute one of the archives of the city. The council shall act only

> by ordinance, resolution or motion * * *. The ayes and nays shall be taken upon the passage of all ordinances or resolutions and entered upon the journal of its proceedings, and every ordinance, resolution or motion shall require on final passage the affirmative votes of a majority of all members of the city council present" (R., 131).

The minutes of the council show this:

> "September 16th, 1919.—Alderman Thomas made a motion that the city engineer prepare plans and specifications and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick. Motion carried." (Book 6, page 524.)
>
> "On motion of Alderman Thomas, the council agreed to pave the intersections on any street that Mr. Levy, the paving contractor, can sign up the property owners on, and the council gave him an option on Lindsay Street and East and West California Street." (Book 6, page 524.)
>
> "On motion of Alderman Barrett, the contract with Mr. R. G. Carraway, paving engineer, was ordered signed by the mayor and secretary when same was approved by the city attorney." (Book 6, page 528.)

This is all the record shows.

The failure to comply with the statute in reference to the estimate of the probable costs rendered the contract and all proceedings thereunder void (Frosh *vs.*

City of Galveston, 73 Tex., 401; City of Corsicana *vs.* Kerr, 89 Tex., 461).

Section 28, Article 2, of the charter says:

> "All contracts, of whatever character, pertaining to public improvements, or the maintenance of public property of said city, involving an outlay of as much as two hundred and fifty dollars ($250), shall be based upon specifications to be prepared and submitted to and approved by the mayor and city council, and after approval of the mayor and city council, advertisement for the proposed work, or matters embraced in said proposed contract, shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be put in a daily newspaper not less than ten times. All bids submitted shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office and be open for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder. The council shall determine the most advantageous bid for the city, and shall enter into contract with the party submitting the lowest secure bid, but shall always in every advertisement of public work or contract involving as much as $250, reserve the right to reject any and all bids. Pending the advertisement of the work or contract proposed, specifications therefor shall be on file in the office of the mayor, subject to the inspection of all parties desiring to bid." (R., 126.) (Special Laws, 31st Legislature, 513.)

There is no pretense that this provision of the charter was complied with.

The motion of September 16, 1919, was that the city engineer prepare plans and specifications and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick (R., 173).

The advertisement for bids and instructions to bidders show upon their face that plans and specifications had not been approved by the city council and were not on file in the office of the mayor subject to the inspection of all parties desiring to bid, but were in the office of the engineer and a copy could be procured by a deposit of $10 (R., 133, 134). There were never any plans and specifications approved or filed. The only ones among the papers or records of the council are the copies attached to the bids.

While the motion says "The courthouse square and Commerce Street from California Street to Scott Street," Dixon and Davis Streets were also paved (R., 179).

The specifications did not mention any street but merely specified the kind of material, work, etc. (R., 141 to 165), nor did the instructions to bidders mention any streets (R., 131-134), nor did the bids mention any streets (R., 134 to 137). The only thing on the city's record in reference to the acceptance of the bid of the Construction Co. is this, appearing on the minutes of November 19, 1919:

> "Alderman Thomas made a motion that the bid of the Southern Construction Company be

accepted as presented leaving off construction bond required and the contractor put up $5,000 in collateral satisfactory to the council and pave with brick on the square, Dixon Street to Broadway, Commerce Street to Scott Street, material to be left open, Dixon Street to M., K. & T. R. R., material to be left open and the mayor and secretary be authorized to make the contract with the Southern Construction Company. A yea and nay vote was taken and resulted in eight yeas and no nays" (R., 164).

The warrants were fraudulently issued pursuant to a scheme devised by the Investment Company who acquired them with full notice. For $15,263.17 of such warrants the city has received no consideration. On the 19th of November, 1919, the day upon which the contract was awarded, the Investment Co., by J. E. Blaine, its agent, agreed to purchase the warrants from the Construction Co. at $.95 on the dollar (R., 207). The Investment Co. thereupon employed Harris, McCall & Graham, Dallas attorneys, to look after the matter. They prepared in duplicate the ordinance of December 16, 1919, confirming the contract and providing for the issuance of the warrants and on December 15, 1919, mailed them to the city secretary (R., 209). In this letter they instructed the secretary in reference to the passage of the ordinance and requested him to certify to the copy which they were enclosing and return it to them as a permanent record to be retained by the purchaser (R., 210). It is a justifiable presumption that Harris, McCall & Graham posted themselves in reference to what was done in order to be able to

pass upon the validity of the warrants. This ordinance of December 16, 1919, occupies pages 231 to 250 of the record. It recited that the contract was based upon specifications prepared and submitted to and approved by the mayor and city council which was untrue (R., 241). It further recites that the bids after being opened remained on file in the mayor's office open for public inspection for at least forty-eight hours before the contract was awarded to the successful bidder, which was untrue (R., 242). It further falsely recided that the Construction Co. had given bond in accordance with Section 29 of the charter, securing the faithful performance of the contract and securing the rights of subcontractors, materialmen and laborers (R., 243).

Section 29, Article 2, of the charter says:

> "The council shall require good and sufficient bond of the contractor with at least two good and sufficient sureties who shall be residents of the State of Texas" (R., 127).

Under Article 5161, page 1448, Revised Statutes, a contractor for public works and improvements is required before commencing work to execute the usual penal bond with additional obligation that such contractor shall promptly make payments to all persons supplying him with labor and materials in the prosecution of the work provided for in such contract. A penal bond is generally in double the amount involved and never less than the amount involved. The instructions to bidders required that the successful bidder should furnish bond in the amount of the bid from

a responsible surety company or from good and sufficient personal sureties (R., 133). The specifications and bid required a maintenance bond in the sum of 25% of the total cost of the improvement (R., 157). The bid of the Construction Co. bound the contractor to execute a construction bond for the performance and completion of the work and to keep the completed work in a state of repairs for five years (R., 134). After the bids were opened the bid of the Construction Co. was accepted, leaving off the bonds and substituting in lieu thereof collateral security of the value of $5,000, but the collateral was never put up. The contract contemplated expenditures by the city and abutting lot owners of exceeding $150,000, yet only $5,000 collateral was to be put up to secure the performance of this contract, payment for the work and material and the maintenance of the completed work for a period of five years. The contract as signed leaves out the construction bonds, the maintenance bond and the penal bond. The fact that these bonds were required of bidders certainly influenced their bids and caused them to bid higher than they otherwise would. The bonds and the agreement to maintain the work were parts of the contract bid on. The contract made must be the same as that bid on. (Dillon on Municipal Corporations, Vol. 2, Section 807, page 1213.)

Harris, McCall & Graham, after the ordinance of December 16, 1919, had been passed and approved, made material changes in the certified copy which had been sent to them as appears from their letter to J. E. Blaine, dated January 2, 1920, and directed that Blaine

see that the same changes were made in the original (R., 210). This letter Blaine sent from Wichita, Kansas, on January 8, 1920, to the city secretary and requested the secretary to look at the original and to be sure that the corrections enumerated were made (R., 212). The ordinance was passed and approved on December 16. Yet early in the following January, material changes were made in it by the attorneys for the Investment Co. and by the secretary at the solicitation of Blaine, the agent of the Investment Co. It seems that Harris, McCall & Graham were indifferent as to the real facts if things appeared regular on the record. On the 19th day of June, 1920, the Investment Co., through J. E. Blaine, its agent, entered into a contract with the city, in which the Investment Co. agreed to furnish the legal proceedings for the issuance of the warrants to the Construction Co. and to defray the expense of printing, as well as all other matters incidental to their issuance, in consideration of which the city agreed to pay to the Investment Co. 5% on all warrants, including the $3,000 issued in April, 1920 (R., 206). The resolutions of September 21, October 5, and November 2 and November 16 were prepared in Dallas in duplicate by Harris, McCall & Graham, the attorneys for the Investment Co., and were brought from Dallas to Gainesville by J. E. Blaine, the agent of the Investment Co. The carbon was used by the city and the original certified to and retained by Blaine. To the original resolution was attached affidavits to be made by the mayor and each alderman to the effect that they had inspected the paving and that it was

actually completed and the amount justly due. The council met at 7:30 at night and the resolutions were passed, the original certified and the affidavits made before adjournment (R., 171). Although the mayor was sick, these resolutions prepared at Dallas recited that he was present. When the council would adjourn, Levy of the Construction Co. and Blaine would go to the residence of the mayor and have him sign the papers (R., 184). The warrants as they were issued were endorsed by the Construction Co. and delivered to H. W. Head, who resided at Sherman, Texas. Head would draw upon the Investment Co. at Wichita, Kansas, for 95% of the principal of the warrants attached (R., 191, 193). Mr. Harris would send to the Investment Co. in every instance a copy of the record with his opinion endorsed. The 95% which H. W. Head received for the warrants never reached the city treasury. As these warrants were from time to time issued to the Construction Co., J. E. Blaine, its agent, was on hand and demanded and received the 5% which the city had agreed to pay (R., 214). The resolutions and the warrants for the 5% bear the same date (R., 214). The Investment Co. also demanded and received from the city the interest that had accrued on the warrants from November 20, 1919, to the time they were delivered by Head, which was something more than a year (R., 213). J. E. Blaine knew at the time the resolutions were passed and the warrants issued that the paving had not been done (R., 216).

The certified copies of the resolutions of September 21st, October 5th, November 2d, and November 16th,

produced by the witness Crummer, were certified to by S. A. Bryan, city secretary. These were typewritten with the exception of the blanks filled in with a pen. They are the originals of the carbon copies that were left with the council, and used by them. These resolutions were approved by the mayor upon the day of their passage and were certified to by the city secretary on the same day, and to each were attached the affidavits made on the same day by the mayor, aldermen and city secretary, before a notary public, and the certificate dated upon the same day in reference to the signatures of the mayor, secretary and treasurer. In other words, everything in the matter of certificates, affidavits and the like bear the same date as the passage of the resolution. The affidavits of the mayor, secretary and aldermen said that the statements contained in the resolutions were true and correct, and that the materials so furnished and the work so performed and covered by the estimate or claim had been by the council inspected and accepted and found to be in accordance with the contract and plans and specifications and had been determined by said council to be well worth the price agreed to be paid therefor as reflected in said statement of account or estimate, and that the City of Gainesville had received full value for the money represented by said warrants. To each of these transcripts was attached the certificate of W. M. Harris saying that he had examined the copy of the proceedings and the warrants and that in his opinion such proceedings show lawful authority and that he found the warrants to

have been properly executed and that in his opinion the warrants were valid and legally binding upon the City of Gainesville (R., 193 & 194).

Blanks were left in the typewritten resolutions sent from Dallas to Gainesville for the insertion of the estimates which the Construction Co. filled in by merely writing $1,700 for material furnished and work performed in one, and $10,000 in the other three (R., 169). The Investment Co. maintained correspondence with J. E. Blaine until the last warrants were paid for (R., 198). Neither J. E. Blaine nor any member of Harris, McCall & Graham was produced by the Investment Co. R. E. Crummer, the vice-president and manager of the Investment Co., was the only witness produced to show want of knowledge of the real facts. It was the duty of J. E. Blaine as representative of the Investment Co. to investigate and report on pending bonds and municipal issues (R., 195). Judge Harris looked after the transaction until it was completed (R., 195). Crummer testified: "I don't know what was in the contract between the city and the Construction Co." (R., 196). A letter from him to Blaine, dated June 18, 1920, shows that he did know the provisions of the contract (R., 203). The expression, "work performed and material furnished," as recited in the resolution did not strike him as peculiar (R., 196). He said he presumed the city officials prepared the resolution (R., 196). This he said though he had contracted to furnish the legal proceedings and his attorneys, Harris, McCall & Graham, prepared the resolutions and his agent Blaine brought

them to Gainesville and presented them to the council. There having been no election, these warrants must be sustained, if at all, as ordinary warrants upon the treasury to pay claims audited and allowed. Such warrants are not negotiable under the law merchant and are subject to any defense which the city has, such as fraud, illegality or failure of consideration, although transferred to someone who had no actual notice (Dillon on Municipal Corporations, Vol. 2, Sec. 856). Wall *vs.* County of Monroe, 103 U. S., 74; Mayor *vs.* Ray, 19 Wall., 468; Watson *vs.* City of Horon, 79 Fed., 449; San Patricio County *vs.* McClane, 44 Tex., 392; Lane *vs.* Hunt County, 35 S. W., 10; Shock *vs.* Colorado County, 315 S. W., 61; Lasater *vs.* Lopez, 110 Tex., 185; 217 S. W., 376; Robertson *vs.* Breedlove, 61; Tex., 316; Allan *vs.* Abernathy, 151 S. W., 348.

The provision of the charter in reference to approved plans and specifications are mandatory, and the failure to comply therewith renders the contract and the proceedings thereunder void. (Dillon on Municipal Corporations, Vol. 2, Secs. 806 and 807.) Limestone County *vs.* Knox, 234 S. W., 131.

Section 28, Article 2, of the charter, *supra*, says that bids, after being opened, shall remain on file in the mayor's office for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder (R., 127). The minutes show that the council convened at 7:30 p. m. on November 18, 1919, and opened the bids (R., 128), and laid them over until November 19 and adjourned to meet at 7:30

p. m. on that date (R., 164), and that the council did meet at 7:30 p. m. on November 19 and awarded the contract to the Construction Co. (R., 164). The prescribed delay of forty-eight hours after the opening of the bids was intended to give time for inspection and consideration and to allow any citizen or other person interested to interpose any objections thereto. It is a mandatory provision that the council could not disregard at its pleasure.

The specifications, instructions to bidders, and the contract says: "The contractor in the construction of the work shall give preference in employment to citizens of the aforesaid city, and when citizens of said city are not available, shall give preference to citizens of the State of Texas" (R., 146). This provision is well calculated to hamper the contractor and increase the costs of the work. The charter of the city, the State statute, and the common law confer upon municipalities no authority to insert such provision in contracts. "A contract prohibiting the employment of any person or persons other than native born or naturalized citizens of the United States is illegal." (Dillon on Municipal Corporation, Vol. 2, Sec. 808).

The facts giving rise to the questions above discussed were alleged in the pleading and sustained by the evidence. They were also urged upon the trial court by requested instructions and by objections to the instructions given, reserved in the bill of exception and presented on error to the circuit court of appeals by specifications and brief.

Section 16, Art. IX, of the charter (R., 130), and Article 544 of the then Revised Statutes, which is Article 1082, page 322 of the present statute, says in reference to the costs of street improvements: "The city council shall pay one-third and the owner of the property two-thirds thereof, except at the intersection of streets, from lot to lot across the streets either way shall be paid for by the city alone. Said costs shall be assessed on the property fronting on said street so improved, to be collected in equal annual payments, not less than five in number. All moneys collected from these assessments shall be appropriated exclusively to the payment of the bonds issued for the payment of the costs of said improvement." Under the ordinance and contract under consideration three-fourths of the costs was assessed against the abutting lot owners, payable one-third on demand and one-third in one, and one-third in two years from date (R., 152 and 153).

Specification of Errors.

The specifications of error filed in the trial court and presented to the circuit court of appeals, and relied on here are as follows:

1

The court erred in refusing to give the first instruction requested by the plaintiff as follows:

> "The treasury warrants issued by the City of Gainesville to the Southern Construction Company described in the pleadings are void and of no validity, because issued without the

consent of the qualified voters of the city of Gainesville granted at an election held for that purpose."

2

The court erred in refusing to give the second instruction requested by the plaintiff as follows:

"The contract between the City of Gainesville and the Southern Construction Company and all proceedings thereunder are void, because said contract, among other things, was made without any preliminary estimate of the cost of the proposed street improvement as prescribed by the charter and the statute."

3

The court erred in refusing to give the third instruction requested by the plaintiff as follows:

"Under Sec. 28, Art. 2 of the Charter of the City of Gainesville contracts are required to be let to the lowest responsible bidder, after the adoption of specifications and the giving of notice. The contract in question having been changed in material respects after the bids were received, without being re-opened to competitive bidding as changed, is void."

4

The court erred in refusing to give the fourth instruction requested by the plaintiff as follows:

"The warrants issued by the City of Gainesville to the Southern Construction Company

are not negotiable instruments, and anyone acquiring such warrants takes subject to any defense that the city would have against them in the hands of the original holder."

5

The court erred in refusing to give the fifth instruction requested by the plaintiff as follows:

"Under the charter of the City of Gainesville in respect to street improvement the city could not pay for the paving of streets by the issuance of long-time warrants; but if without funds to pay for such improvement, the money therefor could not only be raised by the issuance of bonds pursuant to the consent of the qualified voters granted at an election held for that purpose; and that not having been done in this case the contract and the warrants issued pursuant thereto are illegal and void."

6

The court erred in refusing to give the sixth instruction requested by the plaintiff as follows:

"The instructions to bidders and the specifications and contract in question required that the contractor in the employment of labor should give preference to the citizens of Gainesville; and in default of citizens of Gainesville, to citizens of the State of Texas. These provisions were illegal and interfered with fair competition and rendered the contract and all proceedings thereunder void."

7

The court erred in refusing to give the seventh instruction requested by the plaintiff as follows:

> "The unquestioned proof shows that the City of Gainesville received no consideration for $15,263.73 of the Series of $50,000 of warrants issued by it, and that said excess of warrants over the amount of paving done are without consideration and uncollectible."

8

The court erred in refusing to give the eighth instruction requested by the plaintiff as follows:

> "In the acquisition of warrants notice to the agent is notice to the principal, and if J. E. Blaine knew that the warrants in question were issued before the paving, as to which each set of warrants applied, was done and were issued when nothing was due under the contract, then the Brown-Crummer Company is in no better position than the Southern Construction Company, and the Brown-Crummer Company acquired such bonds, if at all, subject to all the defenses the City of Gainesville had against them."

9

The court erred in refusing to give the ninth instruction requested by the plaintiff, as follows:

> "If J. E. Blaine was the agent of Brown-Crummer Company in the purchase of the warrants in question and during said agency and

before Brown-Crummer Company received the warrants and paid therefor said Blaine knew that they were issued for paving not done and in advance of the performance and acceptance of the work, then the Brown-Crummer Company acquired such warrants subject to all the defenses the City of Gainesville had against the same."

10

The court erred in refusing to give the tenth instruction requested by the plaintiff, as follows:

"If the evidence shows that J. E. Blaine was the agent of Brown-Crummer Company, you are then instructed that the knowledge of Blaine would be the knowledge of the Brown-Crummer Company. You are further instructed that in order for Blaine to have been the agent of Brown-Crummer Company it was not necessary for him, at the time of the transactions, to have been in their employ, receiving a salary, but if they entrusted him with the handling of the transactions with regard to the warrants and the purchase of the same, and carrying out these transactions, then you are instructed that this was sufficient to constitute him an agent."

11

The court erred in refusing to give the eleventh instruction requested by the plaintiff, as follows:

"It appears from the evidence that Mr. Harris was the attorney for Brown-Crummer Company in preparing sundry papers in the case,

by virtue of which certain ordinances were passed and the warrants issued; you are instructed that the knowledge of Mr. Harris was the same as the knowledge of Brown-Crummer Company."

12

The court erred in refusing to give the twelfth instruction requested by the plaintiff, as follows:

"The contract for the paving and the ordinances under which it was made prescribed that the abutting lot owner shall pay for three-fourths of the cost of the improvement in front of his property, in three annual installments, bearing interest at the rate of 8 per cent per annum, while the charter required that the abutting lot owner should pay for only two-thirds of the cost of improvement in front of his property, and that the assessments therefor should be payable in equal annual installments, not less than five in number; the failure of the contract and ordinances to comply with the charter in these respects renders the contract and all proceedings thereunder void."

13.

The court erred in refusing to give the following instruction requested by the plaintiff:

The contract between the city of Gainesville and the Southern Construction Co. is void because the unquestioned proof shows that the contract was awarded within less than forty-eight hours after the bids were opened.

14.

R. E. Crummer being an interested party, the jury were the sole judges of his credibility and did not have to accept his evidence as true, and the court therefore erred in instructing a verdict in favor of the Brown-Crummer Investment Company, based solely upon the testimony of said Crummer.

15.

The warrants in question not being negotiable instruments, the court erred in assuming that the Brown-Crummer Investment Co. was a *bona fide* holder, entitled to the protection accorded to *bona fide* holders of negotiable paper, and therefore erred in instructing a verdict in favor of said company.

16.

W. M. Harris, being the agent of the Brown-Crummer Investment Co. to furnish the proceedings in reference to the issuance of the warrants, and to see that everything was in proper shape, notice to him was the same as notice to the Brown-Crummer Investment Co., and the court therefore erred in instructing a verdict in favor of said company.

17.

J. E. Blaine, being unquestionably the agent of the Brown-Crummer Investment Co. in the purchase of the warrants in question, and there being abundant evi-

dence tending to show that said Blaine knew that the warrants were issued before the acceptance or performance of the work, and that the recitals in the resolution for their issuance were false, the court erred in instructing a verdict in favor of the Brown-Crummer Investment Company.

18.

The unquestioned proof showing that the city of Gainesville lacked something over $15,000 of receiving the paving that should have been constructed to entitle the Southern Surety Co. to the $47,000 of warrants, and there being no proof showing or tending to show that H. W. Head paid out upon orders approved by the mayor of Gainesville sums of money aggregating $47,000, the court erred in instructing a verdict in favor of the defendant Head and the Southern Surety Co.

19.

There being no proof that H. W. Head paid out any sums of money upon orders approved by the mayor of Gainesville, the court erred in instructing a verdict in favor of his executor.

20.

The warrants sued on being the last issued, the plaintiff received no consideration therefor or the consideration has wholly failed, therefore the court erred in directing a verdict against the plaintiff on said warrants.

21.

The court, in directing a verdict in favor of the Brown-Crummer Investment Co., deprived the plaintiff of its right of trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States.

22.

The circuit court of appeals erred in holding that it was without jurisdiction of a controversy between the city of Gainesville and the Southern Surety Company and H. O. Head, as executor of H. W. Head.

ARGUMENT.

"A warrant," says Judge Dillon, "is a command of the council, board, or official whose duties it is to pass upon the validity and determine the amount of a claim against the municipality to the treasurer to pay money out of any funds in the city treasury, which are or may become available for the purpose as specified, to a designated person whose claim therefor has been duly adjusted and allowed." (Dillon, Volume 2, Section 850.)

"Being simply a means of paying a debt, it is necessarily implied that a valid debt or obligation of the corporation exists for which a warrant may be drawn. The warrant does not constitute a new debt, or evidence of a new debt, but is only the prescribed means for drawing money from the municipal treasury to pay an existing debt. It may also be laid down that, as a

general rule, the power to issue a warrant does not exist until the audit and allowance of the claim in the manner prescribed by statute." (Dillon, Volume 2, Section 851.)

Warrants cannot be issued and sold by the municipality in order to acquire money for any particular purpose. That is the office of bonds. With the consent of the qualified tax-paying voters, granted in an election held for that purpose, bonds can be issued and sold in order to acquire money to improve streets and to do other things of a public nature. Warrants were never intended for any such purpose, and their attempted use for that purpose is but an evasion of the law against issuance of bonds. (Ashby *vs.* James, 226 S. W., 737.)

In disregard of good business methods and of a mandatory statute, the council entered into a contract with the Southern Construction Company without exacting the bonds required by law. Had the bonds been given, the Construction Company, although insolvent, would have had credit and could have complied with its contract, but, being insolvent and not being backed by any bond, it was without credit. The warrants were issued in advance of the work, with the expectation that they would be sold and the proceeds used by the Construction Company to pay for the work as it progressed. The warrants were not issued in settlement of accounts that were due, but were issued in an attempt to finance the insolvent Construction Company and enable it to go ahead with the paving. In other words, the warrants were issued and sold for the purpose of raising

money to pay for the paving as it progressed—a purpose for which warrants were never intended, and which could only be accomplished by the issuance of bonds.

The circuit court of appeals says that the warrants were *escrowed* with H. W. Head, but not so. The warrants were issued, delivered, sold and put in circulation. An instrument that has been delivered and put in circulation cannot be *in escrow*.

Among the cases relied on by the Investment Co. is Graves *vs.* M. Griffin O'Neil & Sons *et al.*, 189 S. W., 778. That is a decision of an intermediate court, entitled to very little weight as authority. Besides, it was an appeal from an order dissolving a temporary injunction, the granting or dissolving of which rests largely in the discretion of the court. In addition to this, the petition was not properly verified, and after so holding anything further was *obiter dictum* merely. In that case, the so-called warrants were issued in advance of performance, and the ordinance or resolution evidently recited performance. It is strange that the court did not perceive that anything is a fraud upon the law where false recitals are necessary to give it the appearance of validity. The decision is in conflict with the subsequent cases of Foster *vs.* City of Waco and Pulte *vs.* Keel, *supra*.

City of South Houston *et al. vs.* Carman, 6 Fed., 358, is also relied on. The question there was whether the inhabitants, after the dissolution of an illegally organized municipality, were liable for the debts contracted by it while a going concern. That question is not in-

volved here. It will be noted that J. L. Arlitt devised that scheme, and he has established quite a reputation as a handy man where aldermen and county commissioners are seeking to evade the law.

Slayton & Co. *vs.* Panola County, 283 Fed., 330, is another case relied on. That was another fraudulent scheme devised by J. L. Arlitt, and a grievous fraud was perpetrated upon the taxpayers of Panola County. That is one of the recent cases seeking to make the law of negotiable instruments apply to illegally issued warrants.

We do not see that Scott County, Arkansas, *vs.* Advance-Rumley Thresher Co., 288 Fed., 739, has any relevancy to the question. In that case the question of innocent purchaser was not involved, for the court conceded that a purchaser of a warrant takes subject to all defenses that could be urged against the original holder. (See page 745 of that opinion.) In Texas it has frequently been held that an unauthorized act can not be ratified, for the self-evident reason that where there is no power to do, there can be no power to ratify. (City of Bryan *vs.* Page, 51 Tex., 532.)

Grimes County *vs.* W. L. Slayton & Co., 262 S. W., 209, cited by the Investment Co., is another decision of an intermediate court. In that case J. L. Arlitt figured, as usual. There new warrants were issued in lieu of previous warrants, irregular but not void. That case has no bearing upon this. City of Belton *vs.* Brown-Crummer Investment Co., 17 Fed., 2d Series, 70, cited by the other side, involved some refunding warrants, and nothing is there decided in any manner affecting

this case. Evansville *vs.* Dennett, 161 U. S., 434, relied on by the other side, relates to negotiable bonds and has no application to treasury warrants.

Lasater *vs.* Lopez, 110 Tex., 179, is relied on by the other side. That case involved the validity of county warrants issued in settlement for work done on the public roads of the county. A constitutional and statutory duty rested on the county to provide roads, but, unless authorized by statute, the county could not issue negotiable bonds or paper. The county could, however, issue warrants or other evidence of any debt it really owed, but such warrants or evidence were subject to any defense which could be made against them in the hands of the original holder.

As shown by the opinion of the court of civil appeals in the same case, 202 S. W., 1041, the warrants were payable in yearly installments extending over a period of sixteen and one-half years and had attached to them interest coupons representing semi-annual interest at the rate of 6 per cent per annum.

The opinion shows that since the beginning of government it had been the duty of the commissioners' court to establish and maintain public roads, but the opinion is wrong if it intends to say that prior to the inhibition against the issuance of bonds without the consent of the taxpayers, long-time warrants with interest coupons attached were ever employed.

Section 1, Article IV, of the charter says:

> "The city council of the city of Gainesville shall have power and authority by ordinance duly passed, if it so elects, to borrow money on

the credit of the city for permanent improvements, for public buildings, for the permanent improvements of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds, and for the purpose of providing the city with funds for the ownership of public utilities, including water, light, sewer and gas works; and the city council may issue bonds for the city of Gainesville for all or any of the above purposes to any amount not exceeding $150,000 in any one year; provided, that in addition the said city is expressly authorized to issue bonds for the purpose of refunding the bonds of the city previously issued; provided, that the bonds be refunded at the same or a lower rate of interest than the bonds proposed to be retired draw. It is further provided that debt shall never be created by the city of Gainesville unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent thereon.

"No bonds shall be issued for any purpose except the purposes above named, which shall not exceed $150,000 for any one year and for the purpose of refunding bonds previously issued.

"No bonds shall be issued for any purpose in excess of $2,500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt, it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting

the same at the election, at the election so held; but if a majority of the votes polled shall be against the creation of such debt, it shall be unlawful for the city council to issue the bonds.

"In all elections determining the expenditure of money for the assumption of debt only those shall be qualified to vote who pay taxes on property in said city and are legally qualified voters therein.

"No bond shall be issued drawing more than 5 per cent interest, and they shall be invalid if sold for less than par and accrued interest, and all bonds shall express upon their face the purpose for which they are issued.

"The ordinance authorizing any bonds to be issued shall provide for the creation of a sinking fund sufficient to pay the bonds at maturity and make provisions for payment of interest thereof as it matures, and said sinking fund may be invested in the bonds of the State of Texas or in bonds issued by the counties of the State of Texas, or such funds may be used for the purchase of bonds of the city of Gainesville which are not yet due, and neither interest nor sinking fund shall be devoted to any other purpose whatever" (R., 128).

There is conferred upon the council the right to borrow money for the purposes named, but the section prescribes that the money shall be borrowed through the issuance of bonds authorized by the qualified tax-paying voters. The bonds cannot bear interest at a rate exceeding 5 per cent and are rendered invalid if sold at less than par. Nor can exceeding $150,000 be issued in one year. This section seeks to restrict the

right of the council to anticipate and spend the revenues of future years, but the restriction would be meaningless if warrants such as we are considering could be sustained. There would be no limitation as to the amount and no restriction as to interest except the statute of usury. There would be nothing restricting the amount of warrants to a stated percentage of taxable values and exceeding $150,000 could be issued in one year. There would be no limitation as to time except the constitutional requirement of a sinking fund of not less than 2 per cent.

Lasater *vs.* Lopez, 110 Tex., 179, so much relied on by the other side, relates to county, not city warrants. It states that there is imposed upon county commissioners a constitutional and statutory duty to provide roads, courthouses and jails. The opinion is correct in stating that it has always been the law is Texas, as elsewhere, that county warrants are not negotiable instruments and that the purchaser is in no better position than the original holder. The opinion is also correct in saying that the evasion of the law against the issuance of bonds should not be countenanced. In that case the jury had found that the warrants had been issued in good faith and without intent to evade the statute against the issuance of bonds. In Lasater *vs.* Lopez, the warrants aggregated $60,000, payable in yearly installments extending over a period of sixteen and one-half years. This case was held inapplicable to cities in the subsequent cases of Foster *vs.* City of Waco and Pulte *vs.* Keel. If Lasater *vs.* Lopez be cor-

rect, it must be admitted it stretches the law very nearly to the breaking point. If the city of Waco had issued warrants instead of promissory notes, the decision would have been the same, for it is the substance, not the form, of the transaction that controls.

Can it be truthfully said that in the present case there was no intent to get around the provisions of the charter against the issuance of bonds without the consent of the qualified taxpaying voters? The Investment Co. engaged in the business of underriding municipal securities, the contemplated purchaser of the warrants through its agent and attorney prepared an ordinance and resolutions containing many false recitals and prepared affidavits to be signed by the aldermen and other officials containing nothing but falsehoods. It was contemplated by the Investment Co. and its attorney that a certified copy of the ordinance, resolutions and affidavits should accompany the warrants, in the hope that a purchaser from the Investment Co. would rely thereon and would be protected from any defense that the city might have in like manner as if the warrants were negotiable bonds. In other words, through these false recitals and false affidavits, the warrants were sought to be given the properties of negotiable instruments. Can it be said that this fraudulent scheme was devised by the Investment Co. and its attorney and agent in good faith?

No Preliminary Estimates of Costs.

"Individual members of the common council were not invested by the charter with any power to improve

the city property, and any directions given or contracts made by them upon the subject had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this; the common council even could not by any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general, and applies to the corporate authorities of all municipal bodies; where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale; indeed, there is no power to sell in any other way. Aside from the mode designated, there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications." (Zottman *vs.* San Francisco, 20 Calif., 96; 81 Am. Dec., 100.)

Revised Statutes, Article 1083, formerly 554, and Section 16, Art. IX, of the charter prescribes that when a city council shall determine to make any street im-

provement, they shall cause an estimate to be made of the probable costs thereof by the city engineer or by some other officer of the city or by a committee of three aldermen, and such engineer or other officer or committee shall also report a full list of all lots or fractional lots giving number and size of the same and the number of the block in which situated and the names of the owners thereof if known, and such other information as may be prescribed by the city council. This seems to be a very important provision, intended to prevent the council from improvidently entering into a contract without knowing the ultimate liability.

In Frosh *vs.* City of Galveston, 73 Tex., 401, the Supreme Court of Texas, on March 26, 1889, held that the failure to make the preliminary estimate rendered the whole proceedings void. The charter requirements in that case were substantially the same as Article 1083. This case was followed in City of Corsicana *vs.* Kerr, 89 Tex., 461, where the proceedings were under Article 1083 of the present revised statutes, which was then Article 475. See also Kerr *vs.* City of Corsicana, 35 Tex., 694, where the court of civil appeals had passed upon the same case. The Supreme Court said:

> "The evidence introduced in the district court showed that at the time the City of Corsicana determined to make the improvement upon the streets in question a committee was appointed, as required, to make the assessment of the cost of the work in accordance with Articles 474 and 475 of the Revised Statutes, but did not show that the committee made the as-

sessment, but that after the work was done an assessment was made. The City of Corsicana upon the trial in the district court offered to prove by parol evidence that the committee did make an assessment of the cost of the work against each lot as required by law and that said committee made a report thereof in writing which was deposited with the secretary of the city, but did not offer to show that the report so made was accepted and approved by the city council. The testimony thus offered was excluded by the district court, to which ruling the city excepted, saved a bill of exceptions in due form, and presented the ruling by cross assignment in the court of civil appeals.

"The court of civil appeals held that the evidence offered was properly excluded, and that the assessment required by the law to be made, the making of the report by the committee, and its acceptance and approval by the city council, were conditions precedent to the letting of a contract for the work, and that this, not having been done in this case, the assessment made upon the property of the plaintiffs was void, constituted no ground for a recovery by the city, and furnished no authority for the city to sell the property of the plaintiffs. We think that the court of civil appeals properly construed the articles referred to, and we affirm the judgment of that court in reversing the judgment of the district court. We deem it unnecessary to add anything to the opinion of the court in this case. In accordance with the statute we proceed to enter judgment as follows:

> "It is ordered, that the defendants in error have judgment against the City of Corsicana perpetuating the injunction granted by the judge of the district court enjoining the said city, its officers and committee, from advertising, selling or making deeds to any of the lots named under or by virtue of the said assessments, and that the defendants in error each recover of the said City of Corsicana all costs in this behalf expended in each and all the courts; that this opinion and the judgment of this court be certified to the District Court of Navarro County for observance."

The attorneys on the other side seek to avoid the force of these decisions by saying there is no proof that the preliminary estimate was not made. Section 6, Article VII, of the charter says:

> "The council shall act only by ordinance, resolution or motion, and that the council shall sit with open doors, and keep a journal of its proceedings, which shall constitute one of the archives of the city" (131).

The aldermen constituting the council have no power as individuals, but can only bind the city when convened in session as prescribed by law. The transcript contains all that appears on the records of the council concerning the paving prior to the opening of the bids on November 8, 1919 (174), as follows:

> September 16, 1919.
>
> "Alderman Thomas made a motion that the city engineer prepare plans and specifications

and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick. Motion carried" (173).

"On motion of Alderman Thomas, the council agreed to pave the intersections of any street that Mr. Levy, the paving contractor, can sign up the property owners on, and the council gave him an option on Lindsay Street and East and West California Street" (173).

September 16, 1919.

"On motion of Alderman Barrett, the contract with Mr. R. G. Carraway, paving engineer, was ordered signed by the mayor and secretary when same was approved by the city attorney" (173).

There is nothing in the record showing or tending to show that any estimate of the costs of the proposed improvement was ever made, and in fact none was made or attempted to be made. The ordinance of December 16, 1919, approving the contract, while purporting to recite everything that had been done, makes no mention of a preliminary estimate of costs (46). The silence of the minutes and records in the absence of any proof to the contrary is sufficient to show that the preliminary estimate was not made. The first and only mention of the proposed paving is the motion requiring the engineer to prepare plans and specifications and advertise for bids, but no plans and specifications were ever approved by the council. In City of Corsicana *vs.* Kerr, the silence of the record was held to be con-

clusive that the preliminary estimate had not been made.

There does not attach to the abutting lot owner any liability to pay for the improvement in front of his property unless the city council proceeds in accordance with the requirements of the charter or statute. In like manner, no liability attaches to the general taxpayer unless the law has been complied with. The other side cites City of Beaumont *vs.* Masterson, 142 S. W., 984, which is irrelevant to any issue here. There the city of Beaumont was paying for the entire paving out of the proceeds of a bond issue and obligated itself to the contractor to pay for the paving. The city was looking to the abutting lot owners for reimbursement in part, but failed to secure reimbursement to some extent on account of some of the abutting property being homestead upon which no lien could attach. We cannot see wherein City of Corsicana *vs.* Mills, 235 S. W., 220, has any application to this case. Here the contractor in the specifications, bid and contract agreed to look to the abutting lot owners for their *pro rata* of the costs of the paving. The rule seems to prevail everywhere that if there be a failure to do any material thing that the statute or charter says shall be done, the proceeding is void and no liability attaches either to the abutting lot owner or to taxpayers in general.

No Approved Specifications and contract Awarded Before the Council had a Right to do so.

The charter, Section 29, Article II (127), says: "All contracts pertaining to public improvements involving

an outlay of as much as $250 shall be based upon specifications, to be prepared and submitted to and approved by the mayor and city council, and after approval by the mayor and city council, advertisement for the proposed work shall be made, inviting competitive bids for the work proposed to be done, which advertisement shall be published in a daily newspaper not less than ten times. Pending the advertisement of the work or contract proposed, specifications therefor shall be on file in the office of the mayor, subject to the inspection of all parties desiring to bid."

It will be observed that the specifications must be submitted to and approved by the mayor and city council before the invitation to bidders is published. Here no specifications were ever submitted to or approved by the council. On the 16th of September, 1919, a motion was carried directing the engineer to prepare specifications and advertise for bids. The instructions to bidders stated that specifications might be obtained at the office of R. G. Carraway, the city engineer, Gainesville, Texas, upon the deposit of $10, which would be returned upon the submission of a *bona fide* bid (133-134). This shows that there were no approved specifications on file with the city secretary. No specifications had been approved or submitted to the council, for if that had been done it would appear upon the minutes. This provision of the charter cannot be otherwise and mandatory. When the law says that a contract cannot be let unless specifications have been approved and competitive bidding invited upon

such approved specifications, the law means just what it says. A contract let without compliance with this legal requirement is void and unenforceable.

Judge Dillon, Volume 2, Section 801, says: "Where the charter or incorporating act requires the officers of the city to award contracts to the lowest bidder, a contract made in violation of its requirements is illegal; and in an action brought on such contract for the work the city may plead the illegality in defense; and neither the municipality nor its subordinate officers can make a binding contract for such work except in compliance with the requirements of the law."

The Investment Co. realized this, for we find that the warrant ordinance prepared by its attorneys falsely recited that the specifications had been approved by the council before competitive bidding was invited, thus laying the foundation for an estoppel.

Section 28, Article II, of the charter, further says: "All bids submitted shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office and be opened for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder." (127)

In defiance of this provision of the charter, the contract was awarded to the Construction Co. twenty-four hours after the bids were opened. The minutes of the council show when the bids were opened and when the contract was awarded. Yet we find the ordinance prepared by the Investment Co.'s attorneys falsely reciting that they remained on file after being open forty-eight hours before the contract was awarded.

Contract Void Because Let Without Competitive Bidding.

Before bidding can be invited specifications must be approved by the council and on file in the mayor's office. This is essential in order that each bidder may know just what he is to do. The specifications must be such that each bidder has in mind the same thing, for otherwise there can be no competition. While no specifications were approved by the council, they were prepared by Carraway, the engineer, together with instructions to bidders, and these specifications and instructions to bidders were attached to the bids and made a part of the same. The specifications show that the bidder should look to the abutting lot owners for three-fourths of the costs, exclusive of street and alley intersections (152). The specifications require that the successful bidder, before final payment, should execute a bond in 25 per cent of the entire costs, conditioned to keep the improvement in good repair for a period of five years (152). The instructions to bidders required of the successful bidder a bond in the amount of his bid from a responsible surety company, conditioned that he would comply with the contract (133). In addition to this, the State law required a penal bond to pay for the work and material entering into the improvement. In its bid the Construction Co. agreed upon its acceptance to execute a contract and bond for the performance and completion of the work and to keep the completed work in repair for five years (134). It was well known that the city did not have funds to

pay for its *pro rata* in cash, but the specifications are silent upon the subject. The contract, however, provides that the contractor would accept legally issued warrants for the city's *pro rata* of the costs (140). The contract further provides that in lieu of construction, maintenance, and other bonds, the Investment Co. should deposit $5,000, or its equivalent, satisfactory to the city, which, however, was never done (140). The obligation to maintain, the construction bond and the penal bond to pay for the work and materials were material elements in the contract bid on and necessarily influenced the minds of bidders. Statutes like these are mandatory and municipalities cannot make binding contracts without complying with requirements of the law (Dillon, Vol. 2, sec. 801). Cheaper or different material cannot be substituted after the bid has been accepted, nor can the obligation to maintain the work for five years and to give the bonds required by law be dispensed with.

> "In keeping with the same general principle that all the proceedings must be of such a nature as to secure competition, the bid must conform to the plans, specifications, and advertisement of the municipality, and the contract entered into must also conform to the plans, specifications, and advertisement. If a contract differing therefrom in terms be awarded or made, it cannot be said to have been the result of competition which the statute requires, and it is invalid. The rule that the contract must conform to the plan, specification, bid, and advertisement applies, although but one bid was made, and although there is no allegation or suggestion of

fraud, and although the change made in the contract is to the advantage of the city" (Dillon, Vol. 2, Sec. 807).

Restrictions in Reference to Labor.

The specifications say: "The contractor in the construction of the work shall give preference in employment to the citizens of the aforesaid city, and when citizens of said city are not available shall give preference to citizens of the State of Texas" (146). Can the city council thus increase the cost of improvement by restrictions in reference to the labor employed? All such restrictions hamper the contractor and enhance the costs of the work. If the labor can be restricted to citizens of Gainesville, why could it not be restricted to men professing a certain religion or to members of the Ku Klux Klan?

The Law was Disregarded in the Apportionment of the Costs Between the City and the Abutting Lot Owners and in Fixing the Time Within Which the Lot Owners Should Pay.

Article 1082 of the Revised Statutes, which is a part of the city charter, says that the city shall pay one-third of the costs of street improvement and the abutting lot owners two-thirds, except at the intersection of streets from lot to lot across the streets, either way, shall be paved by the city alone. Here, in defiance of the statute and charter, three-fourths of the costs was assessed against the abutting lot owners. The same section says that the assessed costs against the

abutting lot owners shall be collected in equal annual payments, not less than five in number, while here the abutting lot owners were required to pay one-third cash and the balance in one and two years. A burden cannot be imposed upon the lot owners without strictly complying with the law, nor can a burden be imposed upon the city without in like manner complying with the law. The city council has only such authority as the statute and charter confer.

No Estoppel.

On page 43 of our adversaries' brief, it is imagined that the city council accepted $5,000 of Liberty Bonds in lieu of the five years' maintenance bond the Construction Co. had agreed to give. Liberty Bonds are nowhere mentioned in the record. In lieu of the construction, the penal and the maintenance bonds, the Construction Co. agreed to put up $5,000 in money, or its equivalent, but never did so. Whether the assessments against the abutting lot owners have or have not been paid is irrelevant to any issue here, but there is no proof of their payment. Mr. Blanton, the only witness, says: "My impression is that all these paving certificates issued against the property owners have been paid. I don't know about that. I didn't say positive whether they have or not" (182). Upon the testimony of a witness who didn't know, it is positively asserted that the certificates have been paid.

The other side rely on Branch *vs.* The City of Sour Lake, 9 Fed., 2d Series, 971. That case involved the validity of debts contracted by an illegally organized

municipal corporation while a going concern, and which, after contracting the debts, had been dissolved by judicial proceedings. No question like that is involved here. That is a district court decision and cites Slayton *vs.* Panola County, 283 Fed., 330, and Scott County *vs.* Thresher Co.. 288 Fed., 739. The former was a decision by the same district judge. Scott County *vs.* Thresher Co. does not sustain the contentions. It is there held that county warrants are not negotiable paper and that the purchaser takes subject to any defense the county may have and that the refunding warrants have no greater validity than the original warrants. It was held, however, that by accepting and using the machinery, the county rendered itself liable to pay for the same, but this is not the rule in Texas. Here an attempted purchase on credit, without compliance with the law, is void, and the seller can recover the property. No obligation to pay arises from its use, for, if so, there could be done indirectly what cannot be done directly.

If, as claimed by the other side, it is established law in Texas that the revenues of future years can without limitation be anticipated and spent by means of so-called treasury warrants, it is strange that the larger cities, such as Dallas, Fort Worth, San Antonio, Galveston and Houston have not been using them. It is only the governing bodies of a few small cities that have attempted to do so. The bulk, if not all, of these warrants have been issued within the last ten years. Many, if not the bulk of them, have been fraudulently issued. By false recitals on the records it is sought

to give to fraudulent warrants the property of negotiable paper. Pulte *vs.* Keel was a well-considered case. Every decision upon the question was cited in the briefs and arguments of counsel. The attorneys for warrant buyers appeared there as friends of the court and filed briefs. These briefs in behalf of the warrant buyers accompanied the petition for writ of error to the supreme court. It is a reflection upon that court to say that it did not know of every decision in the State upon the questions involved. The Supreme Court of Texas refused the application for writ of error. By refusing the petition the supreme court approved the result and the law as declared. (General Laws, Fortieth Legislature, page 215.) Can we believe that the supreme court had never heard of these vaunted decisions and settled rules of law until our adversaries appeared as friends of the court and told them of the many things they had overlooked? The supreme court did reconsider its refusal and granted the writ, not on account of any error, but because of the conflict between the opinion in Pulte *vs.* Keel and the opinion of the circuit court of appeals in this case. In view of that conflict, the Supreme Court of Texas evidently concluded to give the question further consideration. A conflict between the Texas courts and the U. S. Circuit Court of Appeals upon a question of local law would be productive of much mischief.

This court has long held that municipal warrants or orders on the treasury are not negotiable instruments, and any defense can be made against the purchaser that could have been made against the original holder.

Wall *vs.* County of Monroe, 103 U. S., 74; The Mayor *vs.* Ray, 19 Wall., 468. This rule is nowhere more firmly established than in Texas by a long line of decisions, beginning with San Patricio County *vs.* McClane, 44 Tex., 392, and ending with Lasater *vs.* Lopez, 110 Tex., 185.

It is conceded that for $15,263.71 of this issue of warrants the city of Gainesville received no consideration and that they could not be collected in the hands of the Construction Co., to whom they were issued. It is sought, however, to give to these warrants the properties of commercial paper under the law of estoppel. Every warrant issued, expressly or by necessary implication, states that the claim has been audited and found to be just and due. The recitation of an audit has never been held to make the warrant a negotiable instrument. A municipal corporation is not estopped after a warrant upon its treasury has been issued to set up the defense of *ultra vires* or fraud or want or failure or consideration. (Dillon, Vol. 2, Section 857.) In any event, in order for the city to be estopped, the warrants must be acquired by someone who is ignorant of the facts and has been misled by some misrepresentation. The man who originated the scheme and prepared the proceedings is entitled to no consideration. It is not the duty or the business of an alderman to make affidavits, and he cannot bind the city by so doing. The fact that affidavits were prepared by the attorneys of the Investment Co. and made by the mayor and aldermen and attached to the transcript naturally would give rise to just grounds to the suspicion that

so much drapery was to conceal some known deformity. If the transaction had been honest, the recitations in the resolutions would have been considered sufficient.

Here the only witness to support the estoppel is R. E. Crummer, the Vice President and Manager of the Investment Co., a deeply interested witness. The jury is the judge of the weight to be attached to the evidence of an interested witness. (McCormick *vs.* Kampmann, 102 Tex., 215; Bolt *vs.* State Saving Bank, 145 S. W., 707; Smith *vs.* Milan, 143 S. W., 293; Schumann *vs.* Brownwood Mutual Life Association, 286 S. W., 202; Cheatham *vs.* Riddle, 12 Tex., 112; Coats *vs.* Elliott, 23 Tex., 613.

In September, 1920, the Investment Co. wrote to its attorneys, Harris & Graham, at Dallas, saying they believed that their Mr. Moore suggested to either Harris & Graham, or Mr. Blaine, that it was practicable to arrange for the delivery of the entire series of warrants to the American State Bank at Wichita, Kansas, upon the understanding that the various installments would be approved and released as the estimates were allowed (262). Mr. Crummer was an intelligent man and an underwriter of municipal securities. He knew that warrants could not be issued except as the paving was completed and accepted. This letter shows that Mr. Crummer was in touch with his agent, Blaine, and with his attorneys, Harris & Graham, and that his Mr. Moore had been making suggestions. When we keep in mind the nature of warrants, we realize that they could not be issued in advance of acceptance of the work, and if such was attempted it would be a

fraud. Therefore, to give semblance of validity, false recitals must be made. Yet Mr. Crummer professes to be misled by his own work. Blaine was the agent of the Investment Co. and made the contract with the Construction Co. for the purchase of the warrants at a discount of 5 per cent on November 19, 1919, the day the contract was awarded. He also, as agent of the plaintiff, made a subsequent contract with the city by which the city was to pay 5 per cent on the warrants in consideration of the Investment Co. doing the printing and furnishing the legal proceedings. Harris & Graham were employed by the Investment Co. soon after November 19, 1919, to look after the matter. They, of course, in order to be able to advise intelligently, posted themselves in reference to everything that had been done. They prepared the ordinance of December 16, 1919, confirming the contract and containing many false recitals. In other words, it recites not what had been done, but what should have been done to give the contract any validity (165). After this ordinance had been passed and approved, Harris & Graham made some changes in the certified original, which they retained, and requested the secretary to make like changes in his record. Yet the Investment Co. claims to have been misled by its own work done through its attorneys. The warrant resolutions prepared in Dallas by Harris & Graham are full of false recitals and were brought by Blaine, the Investment Co.'s agent, to the city council, and he stood by while they were being passed. When they were passed he went with Levy to the mayor to have the ordinances approved and the

warrants signed. Blaine and Harris were connected with the transaction as representatives of the Investment Co. from November 19, 1919, until it was finally closed. Blaine was on hand whenever an installment of warrants were sold to collect for the Investment Co. its commission of 5 per cent. Harris and Blaine were the agents and representatives of the Investment Co. and were witnesses hostile to the city. They were not produced by the Investment Co. The failure of a litigant to produce its agents and employees through whom he made the transaction gives rise to unfavorable presumptions. Why were they not produced? They were not produced because the unfavorable presumptions arising from the failure to produce were less damaging than the facts.

Mr. Crummer, the only witness, testified: "I didn't know what was in the contract between the city and the Construction Company. I didn't know the details of the contract. I can't say that the expression, 'Work performed and material furnished,' struck me as somewhat peculiar. I presume the city officials prepared the resolution" (196).

Mr. Crummer professed ignorance of the contract, while in his letter of June 18, 1920, to J. E. Blaine he showed that he was familiar with its provisions and knew its contents (203). He testified that he presumed that the city officials prepared the warrant resolution, when, under his contract with the city of June 18, 1920, the Investment Co. bound itself to furnish the legal proceedings (206). Mr. Crummer doubtless knew that his attorneys, Harris & Graham, prepared the resolu-

tions and affidavits. A jury had the right to look with suspicion upon his evidence. This effort to create the false impression that he did not know the provisions of the contract and presumed the city officials prepared the warrant resolutions shows that his evidence is not to be depended on.

The contract between the city and the Construction Co. provided for monthly payments on engineer's estimates as the work progressed. These estimates were to be furnished and the warrants issued at the first meeting of the council in each month, which was the first Tuesday. Ten per cent was to be withheld until final completion. Between the first of September and the 17th of November $47,000 in warrants were issued when not a single lick of work was being done. The resolutions show upon their face that no engineer's estimates were made, for in the blank left for the estimates is this: "Work performed and material furnished, $17,000. Southern Construction Co. by H. D. Levy." The resolutions show upon their face that nothing was held back, but the full amount for the imaginary work was paid. This should have excited the suspicion of any reasonably prudent man. Blaine was before the council on September 16, 1920, when $10,000 of warrants were issued, and on October 5, 1920, when $17,000 were issued, and on November 2, 1920, when $10,000 were issued, and on November 16, 1920, when $10,000 were issued. These resolutions were prepared in Dallas by Harris & Graham and brought by Blaine to Gainesville. Judging by these resolutions, $141,000 of paving was completed between

the 1st of September and the 16th of November, for the city's part, amounting to $47,000, would indicate a total cost of at least three times that amount. Yet, during that entire time, not a lick of work was done or a foot of paving laid. The recitals in the resolution are a fabrication. Is it possible that neither Harris nor Blaine knew the real facts? The aldermen say that Blaine did know the paving had not been done. The warrants were being issued pursuant to a fraudulent scheme devised by whom? Certainly not by the members of the city council. Our opponents say that there is no proof that Blaine was in Gainesville during daylight. That is all that they say in behalf of their agent, whom they declined to produce as a witness. If he did not know that the paving was not done, why did not the Investment Co. call him as a witness? The streets of Gainesville were lighted, and it was evident to anyone that this $141,000 of imaginary paving had not been done. None of the paving contemplated by these warrants was done until 1921. But it is said that, according to the understanding of Alderman Lewis, the warrants were supposed to be held by Mr. Head in *escrow*. The city council can only act by ordinance, resolution or motion, and the understanding of Mr. Lewis is immaterial. The fact is, Mr. Lewis while he used the term "*escrow*," did not know its legal meaning. That which was done was in fact intended. The warrants were delivered to the Construction Co., by whom they were indorsed and delivered to H. W. Head, and by him were delivered to the Investment Co., the purchaser, and put in circulation. The city accepted

the obligation of H. W. Head to protect it from loss that might arise from the illegal and wrongful issuance and delivery of the warrants. Blaine, the agent of the Investment Co., knew all about the transaction and looked after it until the Investment Co. received the last issue of warrants and received the 5 per cent which the city paid to the Investment Co. for devising and perfecting the scheme. The city, not the Investment Co., was entitled to an instructed verdict. This doctrine of estoppel, existing only in the Fifth Circuit, arising from the recitals in non-negotiable instruments is something new under the sun. It matters not what may be the recitals in a negotiable instrument, a purchaser after maturity takes subject to all the defenses that existed against the original holder. These warrants were never negotiable instruments and are and have ever been like a negotiable instrument after maturity.

H. W. Head's Estate and Southern Surety Company Liable.

If the warrants in question are valid and the city of Gainesville is forced to pay them, judgment should be rendered against the estate of H. W. Head and the Southern Surety Company. They bound themselves to see that the city received $47,000 of paving as per contract. There is neither allegation nor proof that H. W. Head ever paid out any money upon claims approved under the signature of the Mayor of Gainesville. We cannot see where the estate of H. W. Head has any defense to the action in case the warrants are valid and binding obligations.

Jurisdiction.

We do not see that any separable controversy between citizens of different States arose in the State court. There was certainly no removable, separable controversy between the Investment Co. on the one hand and H. W. Head's estate or the Southern Surety Co. on the other, for neither claimed anything of the other. Nor was there any separable controversy between the city of Gainesville and the Investment Co. that could be disposed of in the Federal court disconnected with the other issues. The city of Gainesville not claiming the warrants to be invalid, alleged the facts, but ask in the event that they were held invalid that they be so adjudged. The city was seeking a personal judgment against H. W. Head's estate and the Southern Surety Co. Now, how could this controversy between the city and the Investment Co. be disposed of in the Federal court without the presence of the other parties? If removable at all, the entire case went to the Federal court. It is the suit and not the separable controversy that is removed and the Federal court grants full relief to all the parties. Barney *vs.* Latham, 103 U. S., 205 and 212; Cornell *vs.* Smiley, 256 U. S., 501; Hamilton *vs.* Empire Gas & Fuel Co., 297 Fed., 429.

All of which is respectfully submitted.

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No. 433

IN THE

Supreme Court of the United States

CITY OF GAINESVILLE, PETITIONER,

vs.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD.

BRIEF OF BROWN-CRUMMER INVESTMENT COMPANY.

PRELIMINARY

The Brown-Crummer Investment Company did not file brief herein in response to the petition for a writ of certiorari because it did not receive notice of the date fixed for the submission of the petition and did not anticipate that such petition would be submitted as early as it was in fact submitted.

The petitioner, City of Gainesville, complains of the action of the Circuit Court of Appeals in hold-

ing that the removal of the case to the Federal Court operated merely to remove the controversy between the City and Brown-Crummer Investment Company. We shall submit no argument upon that question. We assume that Brown-Crummer Investment Company is not interested in same one way or the other, because at most this Honorable Court would direct the Circuit Court of Appeals to decide instead of dismissing the controversy between the City and the Head Estate.

As will appear, it is contended by the City herein, among other things, that the forms of warrants involved in this case are really bonds instead of warrants, and not having been authorized by any election, are void, and, furthermore, that even if said obligations are warrants, that the City has no legal power to finance the paving of its streets by the issuance of time warrants, but is confined to the use of bonds. It may be proper, therefore, at the outset, in a preliminary way to state that the identical form of warrant for many years has been in common use in Texas and other southwestern States as the usual and accepted form of warrant, and has been held and recognized by the courts of Texas to be a warrant. Also, for the past fifteen or twenty years it has been a very general custom and prac-

tice by cities and counties of Texas and other southwestern States, to finance many of their public improvements by the issuance of time warrants which do not require the sanction of an election. This has been specially true of street improvements in cities. In most southwestern towns and cities, street improvements on each particular street have been initiated by property owners' petitions. These property owners usually pay three-fourths or two-thirds of the cost of the pavement, and the City issues its warrants for the remainder of the cost. Obviously, it is highly impractical to hold an election to authorize bonds for the City's share of the pavement every time property owners initiate the pavement of a particular street, as the cost and trouble of an election, in most cases, would be disproportionate to the cost of the improvement. It is probably correct to say that in Texas, Oklahoma, Arkansas and Kansas a very large proportion of the outstanding public debt created for public improvements is evidenced by warrants and bonds issued without any vote of the people. In Texas the universal form of warrant is substantially identical to the form involved in this case. Undoubtedly each year, for many years, many millions of dollars of substantially identical warrants for divers of public improvements have been issued in Texas without the sanction of any election, as would be required for the issuance of bonds, and

these securities have been repeatedly sustained by the courts of Texas, and are now held in good faith by investors throughout the county who relied upon what, up to this time, has been accepted as the decided law of the State.

In view of the inaccuracies and omissions in the statements contained in the City's petition and accompanying brief, and in view of the discolored and distempered treatment of the record therein, the Brown-Crummer Investment Company will make its own statements from the record.

The suit was originally brought by the City of Gainesville in the District Court of Cooke County, Texas, on October 11th, 1921, against Southern Construction Company, Southern Surety Company, and H. W. Head. The validity of the warrants was not questioned by the City; on the contrary, the City sought a money judgment against the defendants above named on account of the alleged failure of the Construction Company to finish the job.

Thereupon, Head filed a pleading in which he alleged that the warrants in question were invalid and uncollectible, and that the City, therefore, had suffered no damages as a result of the contractor's failure to finish the job.

On December 10th, 1923, the City filed its First Amended Original Petition, making Brown-Crum-

mer Investment Company a party defendant for the first time, and even then the City alleged that the warrants constituted valid, legal and binding promises and obligation of the City, but, in the alternative, prayed that if said warrants were not valid, which the City denied, that the warrants be cancelled (Tr. 119-122).

It was not until February, 1926, and several years after Head first attempted to raise any question as to the validity of the warrants, that the City decided to co-operate with the Head Estate in trying to defeat the warrants, and then, for the first time, the City actually pleaded that the warrants are invalid, and prayed for their cancellation (Tr. 2-64, 115-116).

In the meantime, the City had voluntarily paid all principal and interest maturing on the warrants during the years 1921, 1922, and up to and including March 1st, 1923. (Tr. 175-176.)

In this belated attempt to repudiate its obligations, the City, in co-operation with the Head Estate, now advances various reasons for the alleged invalidity of the warrants. After the lapse of several years, skillful counsel have subjected the City's entire proceedings to minute microscopic scrutiny, and the following are the alleged infirmities they bring forth:

(a) That the City of Gainesville had no legal power to issue warrants for the payment of the

work, but was confined to the issuance of bonds as the exclusive method of financing available to it, and that it had no power to issue bonds without an election held authorizing same, and that the alleged warrants are really bonds anyway, and were issued without an election.

(b) That plans and specifications for the job had not been approved by the City Council before the contract was let.

(c) That no preliminary estimate of the cost of the proposed improvement was made before the contract was let.

(d) That the bids, after being opened, did not remain on file in the office of the Mayor for public inspection as much as forty-eight hours before any award was made.

(e) That after the award was made, and without re-advertising the job for new bids, the City reduced the amount of the construction bond required of the contractor to Five Thousand Dollars ($5,000.00), and did not require a Maintenance Bond to be given.

(f) That one-fourth (1/4) instead of one-third (1/3) of the cost of the improvement was to be paid for by the City, and that three-fourths (3/4) instead of two-thirds (2/3) was to be assessed against the abutting property owners, according to the provisions contained in the general conditions

and specifications attached to the contract between the City and the contractor.

(g) That no provision was made for paying anything but the City's share of the cost of the job.

(h) The principal point relied upon appears to be the contention that after the issuance of the warrants the contractor did not in fact altogether complete the job, but lacked some $15,000.00 worth of work of doing so, and that for that reason the City failed to receive full consideration for the warrants.

In its pleadings replying to these contentions, Brown-Crummer Investment Company denies the various facts alleged by the City of Gainesville and by the Head Estate, bearing on the alleged invalidity of the warrants, and denies the existence of said alleged infirmities, and denies the alleged invalidity of any of said warrants, and denies that it, the Brown-Crummer Investment Company, had any knowledge of any of the alleged facts or infirmities referred to in the pleadings of the City and the Head Estate.

Brown-Crummer Investment Company further pleaded with much detail and particularity that the City and the Head Estate caused Brown-Crummer Investment Company to pay its money for said warrants by such representations that they are each

now estopped to deny the validity of the warrants (Tr. 82-101). The defense of estoppel last mentioned, as will be shown, reaches each and all of the contentions urged by the City and the Head Estate.

STATEMENT

Events and Proceedings Before December 16, 1919

On September 16th, 1919, motion was carried that the City Engineer should prepare plans and specifications and advertise for bids. (Tr. 173.) The instructions to bidders disclose that at the time said instructions were issued, there existed plans and specifications obtainable at the office of the City Engineer (Tr. 133-134), and the same is again disclosed by the bid of Southern Construction Company (Tr. 134). Both the instructions to bidders and the bid further disclose that the contract was to be a unit price contract, and would, therefore, be applicable to any streets which the City might determine should be paved. The contract between the City and Southern Construction Company, dated November 20th, 1919, adopts and makes a part thereof said plans and specifications, and recites that a bond is thereto annexed.

It appears, therefore, that not only were plans and specifications prepared, but in the manner above mentioned they were approved by the Coun-

cil. Also, it appears that the construction bond was attached to the original contract. By supplemental contract a cash bond for $5,000.00 was substituted in lieu of the construction bond, and in consideration thereof the contractors agreed to accept warrants for the City's share of the work. (Tr. 138-140.)

Plaintiff's witness, F. M. Savage, merely testified that he had never been able to find the instructions to bidders and specifications except as contained in the contract. (Tr. 174.) He did not become City Secretary until the latter part of January, 1921. (Tr. 174.)

No witness in the case testified that plans and specifications for the job had not been prepared or were not approved. Certainly, there is no testimony that Brown-Crummer Investment Company knew same had not been done. There is no testimony that Brown-Crummer Investment Company knew that the bids, after being opened, had remained on file in the Mayor's office, open for public inspection only twenty-four hours instead of forty-eight hours before the award. There is no testimony in the record tending to show that Brown-Crummer Investment Company knew that the amount of the contractor's bond had been changed. Furthermore, the Charter leaves the amount of said bond to the discretion of the Council. The Charter does not require any Main-

tenance Bond to be taken at all, and there is no evidence in the record to show that Brown-Crummer Investment Company was aware that the general instructions and specifications attached to the original contract called for a Maintenance Bond, and there is no evidence in the record to show that Brown-Crummer Investment Company knew that a Maintenance Bond had been waived.

There is no evidence in the record to show that Brown-Crummer Investment Company knew how many times bids were advertised for, or that any changes or adjustments in any of the terms of the contract with the Southern Construction Company had been made after the contract was let.

There is no evidence in the record that no preliminary estimate of cost was in fact made, and certainly there is no evidence in the record to show that Brown-Crummer Investment Company was aware that none had been made. There is no evidence in the record to show that Brown-Crummer Investment Company was aware of any provision in the general instructions or specifications attached to the construction contract to the effect that the contractors should prefer certain classes of laborers; neither is there any evidence in the record to show that Brown-Crummer Investment Company knew what proportion of the cost of the job was being borne by the City and what proportion by the abutting property

owners. Indeed, there is no evidence whatever in the record to show that any representative of Brown-Crummer Investment Company had seen or was familiar with any of the acts or proceedings of the City Council prior to December 16th, 1919, or with the general instructions and specifications attached to the construction contract, in which, according to the City's contention, some of the foregoing preliminary points raised are disclosed. The latter were not set forth in the resolution of the City Council of date December 16th, 1919, and hence were not made known to Brown-Crummer Investment Company by the terms of said resolution. (Tr. 231-250.) Instead said resolution explicitly recites in detail that all necessary steps had been properly taken.

The witness R. E. Crummer testified that he was the active head of Brown-Crummer Investment Company, and that the transaction involved in this suit was handled under his supervision (Tr. 191); and he further testified: "I did not know what was in the contract between the City and the Construction Company." (Tr. 196.)

There is no evidence in the record that any representative of Brown-Crummer Investment Company saw or was aware of the contents of said general instructions and specifications attached to said contract. As will be shortly shown, none of the alleged infirmities above mentioned

are disclosed by the proceedings of the City Council on and after December 16th, 1919, upon which Brown-Crummer Investment Company relied in paying out its money.

The general instructions and specifications attached to the construction contract further disclosed that the liability of the City was, by the express terms of the contract, limited solely to one-fourth of the cost of all the paving, except the cost of street and alley intersections, which latter was to be paid wholly by the City. It was expressly stipulated in said contract that the City should not be liable for any other part of the cost of the job, and that the contractor should look alone to the property owners for their share of the cost of the work, and should hold the City harmless for the collection thereof, and that the City should not become liable for the property owner's share of the cost, or for the collection thereof, and should not even be required to pay any cost of the assessment proceeding against property owners, and that **in no event** should the City be liable for more than the cost of street and alley intersections, and for one-fourth of the rest of the paving. (Tr. 152-156.)

Plaintiff's witness A. M. Bell, admitted that the City's portion of the cost, including intersections, as above defined, would amount to one-third of the total cost, including intersections, as above de-

fined, would amount to one-third of the total cost of the job. (Tr. 178.)

Events and Proceedings On and After December 16, 1919

The first contact which Brown-Crummer Investment Company is shown to have had with the City's proceeding was the preparation on or about December 15, 1919, by Harris, McCall & Graham, attorneys for Brown-Crummer Investment Company, of the form of ordinance which was passed by the City Council on December 16, 1919. (Tr. 209-210.) Some days later, on January 2, 1920, said attorneys wrote to J. E. Blaine, then in the employ of Brown-Crummer Investment Company, calling attention to two clerical corrections which, in their opinion, should be made in the form of resolution, and the original of such letter was forwarded by Mr. Blaine to the City Secretary, requesting that the correction be made. (Tr. 210-212.) As a matter of fact, however, the corrections were never actually made, and the resolution remained in exactly the same form as it was originally passed (See resolution itself Tr. 231-250.) The reason why the form of said resolution was prepared by attorneys for Brown-Crummer Investment Company will appear shortly.

The original contract between Southern Construction Company and Brown-Crummer Invest-

ment Company for the purchase of the warrants stipulated that the Brown-Crummer Investment Company should pay the Southern Construction Company Ninety-five Cents ($.95) on the dollar for same. (Tr. 207-208.)

The witness, Lee Lewis, in substance testified that the time for doing the work under the original construction contract and the time it was contemplated the warrants should be delivered, had expired on account of rain beyond the control of Brown-Crummer Investment Company and of the City, and it was necessary to get an extension of time. (Tr. 216.)

The witness R. E. Crummer testified that the reason for the contract of June 18th, 1920, was because of the delay and the failure of the contractor from whom Brown-Crummer Investment Company had originally purchased the warrants, to deliver them within anything like the time contemplated. The witness Crummer further said:

> "The market had declined to an extent of probably ten per cent. during that period, so that someone was obliged to assume a very great loss on account of the big market decline that took place from the date of the original contract up to about this period." (Tr. 203.)

He further testified:

"It was my understanding that the City of Gainesville assumed some part of the responsibility for all this delay and they were anxious to get us to continue our commitment with the Southern Construction Company and offered us five per cent." (Tr. 205.)

The result was the contract on June 18th, 1920 (Tr. 205.) Said contract between the City of Gainesville and Brown-Crummer Investment Company required the entire issue of warrants, or so much thereof as might be necessary to pay for the work done or materials furnished should be issued within 100 working days from the date of the agreement, and the agreement provided:

"That for and in consideration of the legal proceedings, furnished for the issuance by the City of Gainesville to the Southern Construction Company of warrants in payment for work and materials furnished in the performance of a certain contract for street improvement between the said City of Gainesville and said Southern Construction Company and for the furnishing and printing of such warrants as well as all other matters incidental to the issuance of same—it being understood that said issue shall not exceed $50,000.00 in amount—the City of Gainesville agrees to pay an amount equal to five per cent. (5%) on all such warrants issued. The

above amount to be paid to the Brown-Crummer Company as said warrants are taken up by said company." (Tr. 206.)

Thus it happened that Brown-Crummer Investment Company finally paid 90c on the dollar for the warrants instead of 95c, as originally contracted for, and the undisputed evidence shows this to have been a very liberal arrangement on the part of the Brown-Crummer Investment Company, in view of the terrible decline which had taken place in the security market. It may be recalled that at that time United States Government Liberty Bonds were bringing about 85c on the Dollar.

Such is the basis for the implied charge contained in the City's brief that Brown-Crummer Investment Company had an unfair contract with the City.

Both the original contract for the purchase of the warrants made November, 1919, and the supplemental contract made on June 18th, 1920, contemplated that the proceedings for the issuance of the warrants should be subject to the approval of Brown-Crummer Investment Company's attorney and the latter contract most specifically obligated Brown-Crummer Investment Company, at its expense, to prepare appropriate pro-

ceedings from time to time. (Tr. 206-208.) The responsible attorneys and officials of Brown-Crummer Investment Company passing upon the purchase of the warrants lived at a distance; Harris, McCall & Graham, the attorneys, were located in Dallas, Texas; Mr. R. E. Crummer, the Executive Officer of the company in charge of the matter, was located at Wichita, Kansas, and the contracts above mentioned required the warrants to be delivered at Wichita, Kansas, and there paid for. It is common knowledge that it is the usual every-day practice for investment houses which purchase municipal securities in process of issuance, to furnish the municipality with such proceedings to be had as will be sufficient to satisfy all legal requirements, and to satisfy their own attorneys. Thereby the risk of the proceedings being defective or unsatisfactory is minimized. Surely, there is nothing sinister in such procedure. And so, it happened, as is customary, the attorney for Brown-Crummer Investment Company furnished the City with the forms of proceedings which would be required.

In its petition and brief the City makes the statement that no work had been done on the job when the last four estimates were made and warrants issued therefor. This is not true. All of the estimates were made and warrants issued,

as will shortly appear, during the year 1920. A great deal of work had been done and material furnished in that year. The evidence is as follows:

The witness, F. M. Savage, testified that some tarvia pavement on Dickson and Davis Streets had been done before January, 1921; he did not say how long before. He testified that the contractor did some brick paving after that. He did not testify that the excavation and preparation work for the laying of brick had not been done prior to that time, and he did not testify that there was no material on hand at the time the resolutions were passed. (Tr. 174-175.)

The witness, W. P. Springfield, testified that in 1920, the contractor did tarvia and liquid asphalt paving on Dickson Street and Davis Street and did excavation for brick paving, but that the brick was not laid until 1921. (Tr. 177.)

The witness W. L. Blanton testified that in 1920, paving had been done on Dickson and Davis Streets. (Tr. 180.)

The witness Buckingham testified that there was a time when there was considerable material on the ground, which was later moved away. (Tr. 187.) To the same effect see Tr. 218-19. There is no evidence that any tarvia or asphalt paving was done after 1920.

The record thus discloses that the tarvia and liquid asphalt paving called for by the contract were completed in 1920, and that during that year the excavation and preparation work for the laying of brick on that portion of the job to be paved with brick had been done, and it was only the laying of brick that did not take place until 1921. No witness undertook to testify what proportion of the job had been completed at the several times when the resolutions were passed, or that in fact work had not been done and material furnished at the time that any particular resolution was passed, to justify the issuance of the warrants thereby authorized. Furthermore, the evidence discloses that for a long time much material was on hand on the job, which was moved away, as will be hereafter shown, when late in 1921, the contractors moved off the job. There is nothing in the evidence to show that such material was not on hand when the resolutions were passed, and that same, together with the work then completed, did not then justify the issuance of the warrants authorized by the resolutions.

Sometime in 1921, the contractors were enjoined from completing the job, and said injunction was that year made permanent. The grounds of the injunction are not disclosed by the record. In obedience to this injunction, which

affected a substantial part of the job as a whole, the contractors stopped work. This happened in September, 1921. (Tr. 181-182.)

The plaintiff's witness, W. L. Blanton, further testified that the contractors were willing to go upon any other streets authorized by the City to finish out the quantity of work which their contract with the City contemplated, and they offered to do this, but the witness did not know why such an arrangement was not carried out. (Tr. 183-184.)

Thus, it appears that the contractors stopped work in obedience to an injunction, and only moved off the job after offering to do on other streets the quantity of work which they lacked of finishing the contract in question.

Yet, in the face of the foregoing undisputed evidence, the City seeks to convey the impression that at the time the various warrants were purchased and paid for by Brown-Crummer Investment Company, no work had been done on the job, and that as soon as the warrants had been finally delivered by the City, the contractors quit the job for lack of funds. The record is wholly without evidence to support such contention, if it were material.

R. E. Crummer was Vice President and active head of Brown-Crummer Investment Company,

and the transactions involved in this suit were handled under his supervision and instructions, and the money for the warrants was paid from time to time under his personal direction, and Judge W. M. Harris, of the firm of Harris, McCall & Graham, attorneys, of Dallas, Texas, was passing on the transaction for the Brown-Crummer Investment Company, and from time to time prepared the resolutions and documents above mentioned and sent them to the City by J. E. Blaine, as messenger, or otherwise, to be acted on in due course by the City. (Tr. 191-193, 257-261.) The City was well aware that Mr. R. E. Crummer, of Wichita, Kansas, in behalf of Brown-Crummer Investment Company, was in charge of the transaction and handled the matter of paying for said warrants at Wichita, Kansas, and that W. M. Harris was the attorney passing on the validity of the proceedings and warrants in behalf of Brown-Crummer Investment Company. (Tr. 263-266, 210-212.)

We come now to the proceedings of the City on and after December 16th, 1919. The resolution of December 16, 1919, is set forth verbatim in the transcript, pages 231-250. It recites and represents that the City Council theretofore had determined the necessity for the street improvements, and had entered into a contract for the construction of same in accordance with the plans

and specifications attached to the contract. It sets forth the Construction Company's unit price proposal and certain brief memoranda of agreements made on November 20th, 1919, but does not contain the general instructions and specifications. It further recites and represents that the contracts therein referred to are based on specifications prepared and submitted to and approved by the Mayor and City Council, and were let and entered into after proper advertisement inviting competitive bids, which advertisement was published as required by law for not less than ten days. It further recites and represents that the bids were kept open for public inspection in the office of the Mayor at least forty-eight hours after they were opened, and before the contract was awarded. It further recites and represents that the contractor had given a bond in accordance with Section 29 of the Charter of the City. Thereupon, the construction contract above mentioned is by said resolution in all things approved, ratified and confirmed, and it is provided at length that the City's share of the work should be paid for by the issuance of 6% warrants, payable to the contractor, its assigns, or bearer, principal and interest to be payable at the offices of Brown-Crummer Investment Company in Wichita, Kansas.

The resolution further authorizes and directs

that each of said warrants should carry the following recitations and representations, to-wit:

> "And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant, have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation."

The resolution further provided that the warrants should be executed and delivered upon estimates accepted by the City, such delivery to be made only after inspection of material furnished and labor performed under said contract, and the acceptance of said material and work by the City Council. Here it should be noted that such estimates are not required to be made by the City Engineer.

Finally, the resolution further provided for a tax to pay the principal and interest of the warrants, and to create a Sinking Fund to retire same.

The warrants, when issued, were each in the form set forth in the above resolution, and contained the certificate and representations above authorized. (Tr. 250.)

The resolution above described was passed on December 16th, 1919, and, according to the evidence, is the first of the proceedings of the City which was seen by any representative of Brown-Crummer Investment Company.

On April 6th, 1920, the City Council passed a resolution allowing the first estimate in favor of the Southern Construction Company, contractor, amounting to $3,000.00, which resolution recited and represented that the Southern Construction Company had furnished material and performed labor on the job in the amount of $3,000.00, and that same had been inspected by the Council and accepted by the City to be in accordance with the contract, plans and specifications, and determined by the Council to be well worth the amount reflected in said estimate, and that the claim for said estimate had been duly audited and found to be correct, and had been approved. Thereupon, the resolution allowed the claim and estimate, and directed the delivery of warrants to the amount of $3,000.00 in payment thereof, and further recited and represented that the City of Gainesville had received full value and consideration for the warrants therein authorized to be delivered.

Said resolution of December 16th, 1919, with the resolution of April 6th, 1920, together with the three warrants authorized to be delivered,

were attached to the first draft presented to Brown-Crummer Investment Company at Wichita, Kansas, for payment, covering said three warrants; also, attached to said draft was an affidavit signed by the Mayor and all the Aldermen and City Secretary of the City of Gainesville, reciting in substance that the statements contained in the resolution of April 6th, 1920, are true and correct; that the work done and material furnished had been inspected by the Council and accepted and found to be in accordance with the contract, plans and specifications and well worth the price represented by the estimate, and that the City of Gainesville had received full value for the money represented by the warrants. Also, attached to said draft was an approving opinion of W. M. Harris.

All of these documents, with the three warrants, were forwarded to Wichita, Kansas, by H. W. Head, who was financially interested with Southern Construction Company on the job, and the draft, with such documents attached, was presented to Brown-Crummer Investment Company at Wichita, Kansas, for payment, as the City well knew and understood would be done. (Tr. 251-258.)

On September 21st, 1920, a resolution allowing the second estimate to the contractor, was passed by the City Council.

On October 5th, a resolution allowing the third estimate to the contractor was passed by the City Council.

On November 2nd, 1920, a resolution allowing the fourth estimate to the contractor was passed by the City Council.

On November 16th, 1920, a resolution allowing the fifth and last estimate to the contractor was passed by the City Council.

Each of the last four mentioned resolutions were substantially in terms and language identical with the resolution of April 6th, 1920, above described, and contained like recitations and representations. Each of said resolutions, from time to time was forwarded to Wichita, Kansas, and presented to Brown-Crummer Investment Company for payment, accompanied by and having attached thereto the warrants authorized to be issued by said respective resolutions, and affidavits in terms and language substantially identical with the affidavit accompanying the first draft, as above described, together with an approving opinion from W. M. Harris. (Tr. 258-260, 167-173.)

Each of the ordinances and resolutions above referred to was regularly passed by the City Council of the City of Gainesville on the respective dates above set forth. (Tr. 261.)

In due course, from time to time, the foregoing drafts as presented, with the foregoing documents attached, were paid by Brown-Crummer Investment Company, after R. E. Crummer in each of said cases had examined the warrants and documents attached to the drafts before actually paying the draft, and the undisputed evidence is that R. E. Crummer believed the recitations therein contained to be true, and relied upon them. (Tr. 261.)

Among the papers attached to each of said drafts were the warrants and coupons, for the payment of which drafts were drawn, and said warrants each contained the recitations and representations authorized in the original ordinance of December 16th, 1919, to the effect in substance that all acts, conditions and things required to be done precedent to, and in the issuance of the warrants, had been properly done, happened and performed in regular and due time, form and manner, as required by law. (Tr. 260-261.)

The genuineness of the signatures of the Mayor, Aldermen and officials of the City to the various resolutions, affidavits, etc., above mentioned, was duly proven. (Tr. 185.)

Plaintiff's witness, Buckingham, testified that he and the other members of the Council at the time they signed and passed the resolutions above mentioned, read the said resolutions and were

familiar with what they were signing, and always signed on the advice of the City Attorney of the City of Gainesville (Tr. 186-187.) He further testified that whatever was signed was the adoption of the Council and was signed as a member of the Council. (Tr. 186.)

The first suggestion as to escrowing any part of the warrants was not made until September 27th, 1920, in a letter from R. E. Crummer, Vice President of Brown-Crummer Investment Company to Harris & Graham, of Dallas, Texas, in which he said:

> "We believe our Mr. Moore suggested to either you or Mr. Blaine that if it was practical to arrange for the delivery of this entire issue to the American State Bank of this City at one time upon the understanding that the various installments would be approved and released to us only as the estimates were allowed, that it would be of quite an assistance to us in securing and holding our commitments on this issue, the delivery of which has already been delayed so long that some of our prospective purchasers have practically dismissed the subject from their minds. We can assure you that any assistance you may be able to render us to accomplish this end will be greatly appreciated." (Tr. 262-263.)

Thereupon, on October 1st, 1920, W. M. Harris,

of Harris & Graham, wrote to S. A. Bryan, City Secretary of the City of Gainesville, as follows:

"We have an inquiry from the Brown-Crummer Company of Wichita, Kansas, who are the purchasers of the warrants of your City, suggesting that an arrangement be made with your City for the delivery of all of the remaining warrants, to the American State Bank of Wichita, upon the understanding that the various installments will be approved and released to them as the estimates of the Contractor are allowed, stating that such an arrangement would be quite an assistance to them in securing and holding their commitments on this issue of warrants.

"It occurs to the writer that your City can well afforded to do this for the reason that the purchasers have sustained a loss on the purchase of this series of warrants, and that the City can afford to assist them to this extent, in order to enable them to hold commitments already made.

"Of course, this would necessitate the execution of all of these warrants by the Mayor, yourself and the City Treasurer and forwarding them to the American State Bank of Wichita, Kansas, with instructions to deliver them in installments as authorized by resolution of the City Council of your city. If such

an arrangement is satisfactory, please advise me and at the same time have warrants properly signed by the City officers and sealed with the City seal and forward same as above directed." (Tr. 264-265.)

In the meantime, the first and second drafts covering the warrants issued for the first and second estimates had been paid.

On October 12th, 1920, when the draft covering the warrants issued for the third estimate, amounting to $17,000.00, was presented to the Brown-Crummer Investment Company at Wichita, Kansas, R. E. Crummer wrote directly to the City Treasurer of the City of Gainesville as follows:

"We have today had presented to us $17,000.00 City of Gainesville, Texas, Street Improvement 6% Warrants, being the third installment delivered to the Southern Construction Company.

"We note, however, coupons aggregating $793.39 have been detached, which together with the 5% additional underwriting, makes a total of $1643.39 for which amount you will kindly remit us your check and promptly upon receipt of same, the draft of the Southern Construction Company will be honored.

"It is our understanding that arrangements

would be made with you whereby the entire issue of warrants could be executed and delivered to our bank to be released to us at such times and in such amounts as the estimates are hereafter allowed. On account of the long delay in the closing of this transaction, it would be very helpful to us in the sale of these securities to have this arrangement carried out if possible.

"Kindly let us hear from you by early mail, regarding the above, and greatly oblige." (Tr. 265-266.)

Apparently, so far as Brown-Crummer Investment Company knew, none of the warrants had been actually escrowed up to October 12th, 1920. In each of the foregoing letters, it will be noted that both W. M. Harris, the attorney for Brown-Crummer Investment Company, and R. E. Crummer, the executive head of Brown-Crummer Investment Company in charge of this matter, explicitly made known to the City that they expected the various installments to be approved and released only as estimates were allowed, and that the warrants were to be delivered to the bank at Wichita, Kansas, and released to Brown-Crummer Investment only at such times, and in such amounts as estimates should be thereafter allowed, as shown in the letter of October 12th, 1920, above mentioned. Mr. Crummer himself

made no other suggestion to his own lawyer, W. M. Harris.

Again, on October 30th, 1920, after the remaining warrants amounting to $20,000.00 had been escrowed, and after Head had apparently written to the American State Bank at Wichita, Kansas, that $10,000.00 of said warrants were to be taken up not later than November 5th, and the remaining warrants were to be taken up not lated than November 25th, R. E. Crummer wrote directly to Mr. Head emphasizing his understanding as above explained. The letter reads as follows:

> "We have your favor of the 27th inst. advising shipment of the $20,000.00 City of Gainesville, Texas Improvement Warrants to the American State Bank of this City, which shall be taken up according to the terms of our contract as and when the various installments are due the contractor which you will appreciate must be evidenced by proper legal proceedings.
>
> "We assume your letter of instructions to the American State Bank, in which it is stated that $10,000.00 are to be taken up not later than November 5th, and the remaining $10,000.00 not later than November 25th, is contingent upon the contractor having received

estimates within the times stated and are supplying us with this evidence.

"Any drafts drawn against us should be accompanied with complete legal papers, which the Southern Construction Company have heretofore furnished us, covering the various installments including final approving opinion of Judge Harris." (Tr. 266-267.)

The witness R. E. Crummer testified that pursuant to the letters above mentioned, the warrants were escrowed in the bank at Sherman, that is, the Merchants & Planters National Bank, with which H. W. Head was connected, and subsequently the remaining warrants were escrowed in the bank at Wichita, Kansas, pursuant to the terms stated in said letters. (Tr. 267.)

Plaintiff's witness, Lee Lewis, testified:

"Well, the reason the warrants were issued in advance of the work, according to the contract, they were to be delivered at a certain time and sold at a certain price, under the contract with the Southern Construction Co. and that time had expired on account of rain beyond the control of the Brown-Crummer Co. and the City of Gainesville and it was necessary to an extension of time, and we were advised by the city attorney, Mr. Adams, that those warrants could be issued—and by Hayden W. Head, at Sherman—that those war-

rants could be issued and could be delivered at the proper time and they were issued at that time by the city council and were supposed to be held by Mr. Head. They were to be placed in escrow with Mr. Head. * * * It is not my understanding that the warrants should be turned over to the Southern Construction Co. They were not entitled to the warrants. They were to be held in escrow. Mr. Head was supposed to be responsible for those warrants as well as the surety company bond back of them. All the council should have known at that time of the passage of those resolutions the work hadn't been done. I knew it. * * * * I think it was the intention to deliver the warrants as the work progressed. However, the city attorney advised that they ought to be issued as such had been done in different cases. The Plan was to deliver the warrants as the work progressed and certificates were given by the Council and engineer that the work had been done." (Tr. 216-217.)

At the time of thus escrowing said remaining warrants, the City protected itself by procuring indemnity agreements and bonds from H. W. Head, Southern Construction Company and Southern Surety Company. (See Tr. p. 12-17.)

These indemnity agreements and bonds were

taken to protect the City against any loss should the warrants be finally released to Brown-Crummer Investment Company without the consent of the City.

The witness, R. E. Crummer, testified:

> "I live in Wichita, Kansas. I am Vice President of the Brown-Crummer Company, and was Vice President in 1919, 1920 and 1921. I am the active head of the company. * * * * The transaction was handled under my supervision. * * * * In case of each of these five drafts, I examined the papers attached at the time they reached Wichita, Kansas, and before actually paying the draft. I believed the recitations contained in the papers to be true and relied upon them. If I had known of any infirmities in any of these warrants I would not have paid for them." (Tr., 191-193.)

The City in its petition and brief asserts that R. E. Crummer and Judge W. M. Harris, of Dallas, the attorney of Brown-Crummer Investment Company, and J. E. Blaine, a salesman of the company, each knew of the infirmities claimed, and particularly that the warrants were issued without an equivalent amount of work having been done. These statements are without foundation in the evidence. Judge W. M. Harris was located in Dallas, Texas, and R. E. Crummer was located in Wichita, Kansas, at the time of these

transactions. (Tr. 190-191.) There is not a syllable of evidence in the record indicating that either Harris or Crummer were ever in Gainesville, Texas, or were informed by anyone as to the existence of any of the alleged infirmities, or were informed by anyone that at the time the warrants were delivered to and paid for by Brown-Crummer Investment Company, an equivalent amount of work had not been done. There is not a syllable of evidence anywhere in the record indicating that either Harris or Crummer had any information from any source that any of the recitations and representations in the delivery documents accompanying the drafts were untrue.

J. E. Blaine was an employee of Brown-Crummer Investment Company, whose duty it was to locate prospective municipal issues of securities, and on specific authority in each particular instance, to negotiate a purchase of same. He did not have authority to make any contract without specific authority in the particular instance after submitting the matter to the company. (Tr. 191.)

Blaine negotiated the original contract for the purchase of the warrants from Southern Construction Company November, 1919, under specific instructions from the company. He had no authority to purchase warrants except upon specific authority in each specific transaction. He

had no authority to change any contract without specific authority. (Tr. 204.)

The amended purchase contract between Brown-Crummer Investment Company and the City of Gainesville was entered into under the authority of specific wires passing between Blaine and Crummer, which wires are shown at Tr. p. 203.

It will be noted that Blaine in his wire to Crummer, dated June 17th, 1920, and before any of the disputed estimates were made, stated to Crummer: "Work commences right away in earnest." Up to that time only the first $3,000.00 estimate had been made, and there is no contention that such estimate was not supported by an equivalent amount of work.

Blaine worked on a salary of $200.00 or $250.00 a month. He never received a commission. Judge Harris looked after this transaction until it was completed. Blaine ceased to be in the employ of Brown-Crummer Investment Company on or about September 1st, 1920. (Tr. 195, 197, 204.) Blaine was used as a messenger several times to bring papers which had been prepared by Judge W. M. Harris, at Dallas, to Gainesville, for Council meetings, and after he left the employment of Brown-Crummer Investment Company, Mr. Crummer used Blaine as a matter of courtesy and accomodation in connection with the 5% adjustments on the price of the warrants called for by the contract

of June 18th, 1920, on account of the fact that Blaine was familiar with the deal, and the City made out some of the adjustment checks to Blaine, even though in several letters the Brown-Crummer Investment Company had written the City to remit such checks to them. Blaine, of course, in due course endorsed these little adjustment checks and forwarded them to Brown-Crummer Investment Company. (Tr. 195, 197, 198, 199, 213, 214.) As a matter of fact, these 5% checks were made by the City at times to Blaine and at times to Brown-Crummer Investment Company interchangeably. (Tr. 214-215.)

There is no evidence in the record that Blaine at any time was told by anyone, or knew that when the various warrants were finally delivered to Brown-Crummer Investment Company and paid for that an equivalent amount of work for same had not been done. The only evidence in the record is that Blaine was present at some of the Council meetings at which such estimates were allowed. These meetings took place at night, when the Council meetings were regularly held, and there is no evidence that Blaine was ever in Gainesville during the period in controversy in the day time, or that he viewed, inspected or saw the progress of the job even on the occasion of any of these night visits. Neither is there any evidence that if Blaine had looked at the job on such night visits he could have formed any

opinion, or was qualified to form any opinion as to whether the job had progressed to a point justifying any particular estimate. One or two of the witnesses **presume** that Blaine must have known that the various estimate were not supported by an equivalent amount of work because of his presence at some of the night meetings as aforesaid. **This presumption on the part of one or two of the witnesses is the sole basis of the City's contention that Brown-Crummer Investment Company was aware of any alleged infirmities in the warrants.** (Tr. 218, 184, 186). For a time there was a lot of material on hand that was later moved away. (Tr. 187, 218). Brown-Crummer Investment Company never received any report or information from Blaine that the warrants were being handled in a manner other than that outlined in the letters introduced in evidence. (Tr. 205). Said letters are set forth in the transcript at pages 262-267, and disclose that the City received both from Judge W. M. Harris and from Mr. Crummer, who were Blaine's superiors, the most explicit statements that Brown-Crummer Investment Company expected and understood that the warrants would be released from escrow and paid for only as and when estimates were issued for labor done and material furnished.

The City knew from the beginning of the trans-

action that W. M. Harris was passing upon the validity of the warrants from time to time in behalf of Brown-Crummer Investment Company, and that Mr. Crummer was handling the transaction for Brown-Crummer Investment Company at Wichita, Kansas, where the warrants were being paid for in accordance with the terms of the purchase contract. The City further knew that both Mr. Crummer and Mr. Harris were Blaine's superiors, and, as above stated, the City had direct and explicit statements in said letters from both Harris and Crummer as to the basis, understanding and conditions upon which Brown-Crummer Investment Company was paying for the warrants from time to time.

ARGUMENT

As may be seen from the list of points raised by the City, set forth at the outset of this brief, most of said points are in the nature of alleged procedural irregularities. Before coming to the more fundamental aspects of the case, we desire first to submit certain preliminary special comment on these alleged irregularities.

PRELIMINARY COMMENT ON CERTAIN ALLEGED IRREGULARITIES

1. The City contends that plans and specifications for the job had not been approved by the

City Council before the contract was let. As a matter of fact, however, the proceedings of the Council prior to December 16th, 1919, clearly show that plans and specifications had been prepared and were in existence, and were attached to the instructions to bidders, and also attached to the contract made with the Southern Construction Company. And the action of the City Council in advertising for bids on the basis of said plans and specifications, and the action of the City Council in incorporating said plans and specifications into the instructions to bidders and in making the contract with Southern Construction Company, of which contract said plans and specifications were a part, constituted abundant approval of said plans and specifications. (Tr. 173, 133-134).

2. The City contends that no preliminary estimate of the cost of the proposed improvement was made before the contract was let. Article 1083 of the Revised Statutes of Texas does not require such estimate to be made by the City Engineer, but permits the estimate to be made by the "City Engineer or by some other Officer of the City, or by a Committee of Aldermen." As a matter of fact, there is no evidence in the record that no preliminary estimate of cost was in fact made. The witness, F. M. Savage, (Tr. 175), testified that he had been able to find no estimates on file

made by the Engineer in reference to the several estimates allowed from time to time by the City Council. This, of course, has no reference to the preliminary estimate of cost. There is nothing in the record to show that such preliminary estimates of cost was not made either by the City Engineer or by some other Officer of the City, or by a Committee of Aldermen, and the presumption of law is that the City Officials did their duty.

3. The City claims that the bids did not remain open on file in the office of the Mayor for public inspection as much as forty-eight hours before the award was made. It seems to be true that such bids thus remained open for public inspection for only twenty-four hours instead of forty-eight hours.

4. The City claims that after the award was made, and without re-advertising the job for new bids, the City reduced the amount of the construction bond required of the contractor to $5,000.00, and did not require a Maintenance Bond to be given; and it is argued that the City Charter requires a bond to be taken from the contractor in the amount of the cost of the job. As a matter of fact the City Charter leaves the amount of the bond entirely to the discretion of the City Council. Also, it appears that a bond was actually taken from the contractor, and the contract between

the City and Southern Construction Company, dated November 20th, 1919, recites that a bond is thereto annexed, and there is no evidence that such bond was not thereto annexed. It seems, however, that a supplemental contract was made between the City and the Construction Company, whereby, in consideration of the contractor agreeing to accept warrants for the work, the City agreed to reduce the amount of the bond to be required of the contractor to $5,000.00, and a deposit of $5,000.00 in Liberty Bonds was taken in lieu of such bond. It certainly was within the discretion of the City Council to accept a $5,000.00 bond if it saw fit to do so. The Charter does not require any Maintenance Bond to be taken at all, and the City Council, therefore, had a right to waive the requirement of the Maintenance Bond in consideration of the contractor's agreement to take long time warrants for the work.

5. The City contends that the consideration contract required the contractor to give preference to certain classes of laborers. Such a provision appears to have been included in the construction contract.

6. The City contends that according to the provisions contained in the general conditions and specifications attached to the construction contract, one-fourth instead of one-third of the cost

of the improvement, besides the cost of intersections, was to be paid for by the City, and that three-fourths instead of two-thirds was to be assessed against the abutting property owners. It seems to be true that such provisions were contained in said general conditions and specifications. It will be observed, however, that the City can hardly be heard to complain that it was required to pay a smaller proportion of the cost of the improvement than the Charter contemplated. As to the abutting property owners, there is no evidence that any of them have ever complained because they were required to pay a larger proportion of the cost than the Charter contemplated. On the contrary, the evidence is that all of the assessment certificates against the abutting property owners have been paid. The only party complaining is the City, and it is in the attitude of complaining that it is required to pay less than the proportion it should have borne.

7. In the same connection, the City further contends that the entire proceedings are void because no provision, as required by the Constitution and statutes of Texas, was made for the payment of that part of the cost of the job chargeable to the abutting property owners. This contention assumes that that portion of the cost of the job chargable to abutting property owners is an indebtedness of the City, and further assumes

that the issuance of assessment certificates against abutting property owners is not a sufficient provision for the payment of such indebtedness. Both of these assumptions are unsound. The facts in this case are that the City became liable only for its one-fourth of the cost, plus the cost of the intersections, and no part of the remainder of the cost ever constituted a debt of the City. The construction contract emphatically provided that the contractor should not have the right to look to the City for any part of the cost of the job except the one-fourth plus the cost of intersections, and that in no event should the City be liable for any other part of the cost or even for the cost of the assessment proceedings necessary to fix the liability of abutting property owners and that the contractor should look alone to the abutting property owners for the remaining cost of the job. Thus, by the terms of the contract **the portion of the job chargeable to abutting property owners never became a debt of the City, and hence it was not necessary for the City to make provision for the payment thereof.**

In the event the City were legally liable for the entire cost of the job and merely had the right to reimburse itself for a part of the cost by assessing same against abutting property owners, it has been decided in Texas that a bona fide attempt by the City to take appropriate proceed-

ing to assess abutting property owners their part of the cost of the improvement, is a sufficient provision for the payment of the indebtedness within Section 5, Article 11 of the Constitution and statutes of the state. And such proceedings have been held a sufficient provision for the payment of such indebtedness, even though some of the asesssments turned out to be uncollectible.

See:

City of Beaumont vs. Masterson, 142 S. W., 984.

City of Corsicana vs. Mills, 235 S. W., 225.

It follows from what has been said under the facts of this case the property owners' share of the cost was not a debt of the City, and it was not necessary for the City to make any provision for the payment thereof, so far as the requirements of the Constitution and statutes of the State are concerned, and even if were such a debt, the proceedings taken by the City to assess abutting property owners would constitute a sufficient provision for the payment of such debt.

Each and all of the contentions of the City above enumerated are based upon alleged irregularities in the proceedings of the City Council prior to December 16th, 1919. There is not a syllable of evidence in the record indicating that the Brown-Crummer Investment Company, or

any representative of the company, saw any of said preliminary proceedings, or that they, or any of them, were aware of any of said alleged infirmities. No proceedings of the City Council earlier than the resolution of December 19th, 1919, are shown by the City ever to have been seen by any representative of Brown-Crummer Investment Company until years after all of the warrants had been finally delivered and paid for.

We shall have occasion to refer again to the above mentioned miscellaneous contentions of the City in connection with the more important aspects of the case to which we now come.

THE SECURITIES ISSUED ARE WARRANTS, NOT BONDS

The contention that the securities involved in this case are really bonds instead of warrants, and that they were issued without holding an election to authorize same, and are, therefore, void, has heretofore been definitely settled by the courts of Texas.

In Lasater vs. Lopez, 202 S. W. 1039, 217 S. W. 377, the securities involved were substantially identical in form to those involved here, and the contention was made that they were really bonds. The Supreme Court of Texas held that where the intention of the governing body of the municipal-

ity was to issue warrants, the instruments issued are warrants, even though they have some of the characteristics of bonds. Judge Phillips used the following language:

> "The instruments issued by the Commissioners' Court to White cannot be held to be bonds. They have possibly some of the characteristics of bonds, but that does not make them bonds. Their controlling features are those of warrants. That interest coupons were attached to them, as is ordinarily the case with bonds, is not determinative of their nature. The notes attacked in City of Tyler vs. Jester, 97 Tex. 344, 78 S. W. 1058, and which it was contended were essentially bonds, also bore interest coupons. The court recognized that they had some of the characteristics of bonds, but, with the city empowered to issue notes and the evident intention being to issue nothing else, it was held that such intention should not be denied but ought to be given effect. That decision governs this feature of the case. Under the jury's verdict, conclusive here upon the issues of fact, the intention of the Commissioners' Court was to issue only warrants, and it had no purpose to circumvent the laws governing the issuance of county bonds through the use of a device. The instruments issued were as much like warrants as bonds.

In our opinion, they more resemble warrants. The Commissioners' Court had the power to issue warrants. Its intention to do so, with the instruments having essential features of warrants, should be sustained rather than thwarted."

Substantially identical instruments were held to be warrants also in the following cases:

Payne, et al, vs. First National Bank of Columbus (Commission of Appeals, approved by Texas Supreme Court), 291 S. W. 209;

City of Tyler vs. Jester, 97 Texas, 344;

Graves vs. M. Griffin O'Neal & Sons, 189 S. W. 778;

Slayton & Company vs. Panola County, 283 Fed., 330;

Branch vs. City of Sour Lake, 6 Fed. (2nd) 655, 9 Fed., (2nd), 971.

In each of the foregoing decisions it is held that instruments substantially identical to those issued in this case are warrants when the municipality intended to issue warrants and took the steps necessary therefor, regardless of the form of the instruments and the fact that they contained some elements of bonds. Other cases in which substantially identical instruments are recognized as warrants are:

Grimes County vs. W. M. Slayton & Co., 262 S. W., 209.

Bridges vs. The City of Lampasas, 249 S. W. 1085.

Stratton vs. Commissioners Court of Kinney, 107 S. W. 1170.

Commissioners Court vs. Nichols, 102 S. W. 37.

Allen vs. Abernathy, 151 S. W. 37.

Therefore, by the foregoing cases, it should be no longer a question in Texas that the instruments involved in this case are warrants. All of the proceedings of the City of Gainesville in this case plainly manifest an intention on the part of the city that such instruments should be warrants.

For many years such form of warrants have been the usual and accepted form issued by the municipalities of Texas and commonly in circulation in the securities market throughout the country. Many millions of dollars of such warrants are now held in good faith by investors who relied upon what, up to this time, has been accepted as the decided law of this State and a settled doctrine in its commercial jurisprudence. The contention of the City to the contrary is evidently based upon a very recent decision of one of the intermediate courts of this State, to-wit, the Fort Worth Court of Civil Appeals, in Pulte vs. Keel, Mayor et al., 297 S. W. 241, and

another decision of the same intermediate court, to-wit, the case of J. M. Childers, et al, vs. R. E. Sheppard, et al, —— S. W. ——, following the first decision above mentioned. The last decision was just rendered on December 3, 1927.

In these cases the Fort Worth Court of Civil Appeals held such form of warrants to be really bonds requiring the sanction of an election to authorize their issuance. This holding, however, was made apparently without any consciousness whatever of the existence of previous contrary decisions of the Supreme Court of this State and other courts of this State. The opinion of said Court of Civil Appeals nowhere refers, directly or indirectly, to any of such pre-existing authorities, and when such pre-existing authorities were properly called to the attention of the Supreme Court of this State upon motion for rehearing upon application for writ of error, the Supreme Court granted a rehearing in the case of Pulte vs. Keel, supra, and said case is now pending before the Supreme Court of this State. There is every reason to assume that the Supreme Court of Texas will correct the unconscious departure made by the Fort Worth Court of Civil Appeals from the settled law of the State.

THE CITY'S POWERS

The contention that the Gainesville charter does

not authorize the City to finance public improvements by the issuance of time warrants, and that the City is confined to the issuance of bonds as the sole method of financing such improvements, is likewise indefensible either on reason or authority.

This contention is based upon Article IV, Section 1, of the charter, which reads substantially as follows:

> "The City Council of the City of Gainesville shall have the power and authority*** to borrow money on the credit of the City*** for the permanent improvement of the streets ***paving and repaving of streets**; and the Council may issue bonds for the City of Gainesville for all or any of the above purposes, etc."

The theory is that the specification of the method "the Council may issue bonds, etc." excludes all other methods of financing any character of public improvement therein mentioned. In said Article IV, Section 1, the power to pave streets on the City's credit is first conferred unqualifiedly. Then follows the clause that the Council may issue bonds. This clause is separated from the first clause by a semi-colon, and there is no language in the section which confines the City to the use of bonds exclusively. If the section is to be construed as confining the City

to that one method of financing, that must be done by implication. Of course, it is always a question of legislative intention whether it was the purpose of the Legislature in authorizing a municipality to do a thing and specifying a particular method by which it may be done, to exclude all other methods of doing the thing and to prohibit the municipality from using any other appropriate method.

Here again the City's contention is based upon the case of Pulte vs. Keel, supra, and authorities therein cited. In the cases cited by the Fort Worth Court of Civil Appeals, however, it will be noted that in each instance the Court construes it to be the intention of the Legislature in that particular case to withhold from the municipality the authority to use any other method than that specified. For illustration we will refer to the decision which said Court urges as its strongest and clearest authority, to-wit: Foster vs. City of Waco, 113 Texas, 352. In that case the City of Waco bought 200 acres of land for cemetery purposes, and in part payment for same executed its nine promissory **negotiable** notes, each for $5,000.00. The power of the City to issue the notes without the question ever having been submitted to the voters was challenged. The Waco charter authorized the Board of Commissioners to create debts payable other than out of current

revenue in two ways, first by the issuance of bonds upon the vote of the people; second, by the creation of a "deficit" in a limited amount payable out of the current revenue for the next succeeding year. Another provision declares in substance that in the event the revenues of the City for any one year should not be sufficient "to meet the legitimate expenditures", the Board of Commissioners may incur a deficit over and above the revenues to the extent of $50,000.00, **and no more,** the excess, if any, over the amount being "absolutely null and void." The time and manner for paying the excess of "legitimate expenditures" over the revenue is prescribed as follows:

> "It shall be the duty of the Board of Commissioners to include the amount of such deficit in its budget of expenses to be provided for at the next succeeding tax levy, and the City Auditor shall include the same in the estimate which he is required to furnish to the Board of Commissioners annually of all the revenues and expenses from which such budget is made, **and said Board shall fix a rate of taxation for said year sufficient to pay off and discharge said deficit,** as well as meet the estimated current expenses of said year."

The City in issuing the notes levied taxes only in an amount sufficient in each year to pay off the principal of one of the notes and interest on

all of them. The Court pointed out that the purchase of the cemetery is a "legitimate expenditure" within the meaning of the charter, and hence was governed by the deficit provision above mentioned, which contemplated that the Board of Commissioners must incur the deficit in the manner specified in the charter, and to that extent and no more, and the charter expressly provides that the excess, if any, over that amount is absolutely null and void.

In view of the emphatic provisions of the charter above referred to, it was held that the City of Waco had power to employ only two methods in providing for the payment of the cemetery, to-wit, either by issuing bonds, under Article 202, or by incurring a deficit as outlined in Article 211. In other words, **under the phraseology of that particular charter,** a specification of said methods was held to exclude others, and the Court summarized its decision as follows:

> "That the mere grant of authority to purchase cemetery grounds **in view of the other articles of the charter referred to by us,** does not carry with it by implication the power of incurring a debt running over a series of years evidenced by notes as in this case."

It might also be added in passing, that the notes issued were **negotiable** notes, and it is a well settled

rule of charter construction that the power to issue negotiable obligations will not be implied, and that familiar rule of construction would alone have been sufficient to take care of the Waco case.

The principle of the Waco case, however, cannot be conceivably applied to the case at bar because the charter of the City of Gainesville is radically different from the Waco charter, and there are provisions in the Gainesville charter which absolutely preclude the application to it of the rules of construction contended for by the City. In one of the opening sections of the Gainesville charter, to-wit, Article II, Section 3, the following vitally important provision appears:

> "That the **specifications of particular powers shall never be construed as a limitation upon the general powers herein granted;** it being intended by this Act to grant to and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter, etc."

Thus, at the very outset of the Gainesville charter the Legislature has solemnly declared that in construing said charter the specification of particular powers shall never be construed as limita-

tion upon the general powers therein granted. In other words, the Legislature has expressly forbidden the application to the Gainesville charter of the rule of construction contended for by the City in this case. Plainly, therefore, the specification of the power to issue bonds in Article IV, Section 1, of the Gainesville charter cannot be construed to limit the general power of the City to pave streets on its credit. This general power is conferred and emphasized in a number of sections of the charter.

In Article II, Section 1, the City of Gainesville is given general power to contract and be contracted with.

In Article II, Section 5, it is given the exclusive power and control over streets, etc., and to pave its streets, etc. (Tr. 230).

In Article III, Section 1, it is given the general power to levy taxes for general purposes (Tr. 230).

In the first clause of Article IV, Section 1, it is given general power on its credit to pave its streets (Tr. 128).

And then in Article IX, Section 16, in addition to the powers already mentioned, the City is given the following further powers in substantially the following language:

> **"In addition to the other powers of the City Council herein mentioned,** *** is invested with full power and authority to pave or otherwise improve any street****".

And then follows an adoption of Articles 544-547 of the 1911 Revised Statutes of Texas for certain purposes, but among those purposes is not included the method by which the City may finance its share of the cost.

The Gainesville charter, therefore, repeatedly confers upon the City Council the broadest powers to pave and improve its streets on its credit. Nowhere does said charter suggest that the City shall be confined to the issuance of bonds in financing such improvements. The charter itself says in the most decisive language that the specification of a particular power shall never be construed as a limitation of the general powers conferred by the charter. **It is well established that municipal corporations are invested by implication with the power to contract on the general credit of the City with respect to such improvements as they are authorized to make.**

City of Galveston vs. Looni, 54 Texas, 517.

City of Galveston vs. Heard, 54 Texas, 420.

Graves vs. M. Griffin O'Neal & Sons, 189 S. W. 778.

Briddle vs. City of Terrell, 82 Texas, 335.

City of Terrell vs. Dessaint, 71 Texas, 770.

Police vs. Britton, 21 L. Ed. 251.

Cleburne County vs. Brooks, 28 L. Ed. 470, 111 U. S. 400.

Allen vs. Lafayette, 8 So. 30.

Hoffman vs. Pawnee County, 41 Pac. 566.

It is also well established in Texas that a city has the right to pay for improvements which it is authorized to make **by issuing time warrants** to evidence its indebtedness therefor.

Bridges vs. City of Lampass, 249 S. W. 1083.

First National Bank vs. City of North Pleasanton, 257 S. W. 609.

City of Corpus Christi vs. Wassener, 58 Texas, 462.

City of Tyler vs. Jester, 74 S. W. 359, 78 S. W. 1058.

Noel vs. City of San Antonio, 33 S. W. 263.

The same doctrine applied to counties is established in the following cases:

Grimes County vs. W. L. Slayton & Co., 262 S. W. 209.

Lasater vs. Lopez, 110 Texas 179.

Stratton vs. Kenney County, 137 S. W. 1170.

Allen vs. Abernathe, 151 S. W. 349.

San Patricio County vs. McClane, 59 Texas, 248.

Cowan vs. Dupree, 139 S. W. 887.

There being in the Gainesville charter no express prohibition of the use of warrants, the foregoing decisions incontestably establish the right of the City to finance street paving by the use of time warrants. Thus, the existence of such general power in the City of Gainesville is beyond the domain of doubt.

The City and the Head Estate profess to perceive great danger in this power. They say that the exercise of this power to an "unlimited amount" without authority of the voters might lead to the greatest abuse of official discretion. If there were anything in this argument, it should be properly addressed to the Legislature. However, there is nothing in the argument because although the City has the power to issue warrants, it has not the power to issue them "to an unlimited amount". There are familiar constitutional and statutory limitations upon the power of a city in Texas to incur debts and levy taxes. These general limitations establish the boundaries within which the power to issue warrants must be exercised. There is, of course, no evidence and no pretense that the City of Gainesville in this case has exceeded any of these limitations.

The holding of the Fort Worth Court of Civil

Appeals, in Pulte vs. Keel, supra, like its holding about the form of the warrants, is in direct conflict with the foregoing previous decisions in this State, including some by the Supreme Court of this State, upon which decisions above mentioned the municipalities of this State, as well as investors throughout the country, have long relied. None of such previous decisions are mentioned in the opinion of the Fort Worth Court of Civil Appeals, and so far as may be gathered from its opinion, said Court appears not to have been conscious of the existence of such former decisions. And, as above mentioned, a rehearing has been granted by the Supreme Court of Texas upon application for writ of error in said case of Pulte vs. Keel, supra, and the same is now pending before said Supreme Court of this State. As a matter of fact, there are numerous cities in Texas having charters substantially identical to the Gainesville charter. Indeed, the Gainesville charter in respect to the features involved in this case, is the usual and normal charter prevailing in Texas, and for many years such cities have been financing divers public improvements by issuing time warrants in substantially the identical form involved in this case, and have been doing so in reliance upon what has long been regarded as the settled and decided law of the State.

ESTOPPEL

Thus, we have seen that the City of Gainesville is invested with the general fundamental power to issue time warrants for street paving. But the City claims that certain irregularities exist in the manner in which that power has been exercised in this particular case. These criticisms do not relate to the existence of the power, which we submit undeniably exists, but relate rather to the manner of its exercise, and to the circumstances under which it was exercised. Furthermore, in each instance the alleged existence of the irregularity is in its nature a **fact** matter, and is, therefore, a matter upon which, as we shall see, the City may estop itself by its representations. Thus, it may be a fact, or it may not be a fact that the plans and specifications for the job had not been approved by the City Council before the contract was let; it may be a fact, or it may not be a fact that no preliminary estimate of cost was made before the contract was let; it may be a fact, or it may not be a fact that the bids did not remain open to public inspection forty-eight hours before the award was made; it may be a fact, or it may not be a fact that after the award was made, and without readvertising the job for new bids, the City reduced the amount of the construction bond and waived the maintenance bond; it may be a fact, or it may not be a fact that the construction

contract required the contractor to prefer certain kinds of laborers; it may be a fact, or it may not be a fact that the construction contract stipulated that the City should pay one-fourth instead of one-third of the cost, and the property owners two-thirds instead of three-fourths thereof; it may be a fact, or it may not be a fact that the City made no provision for paying for a certain part of the cost of the job; it may be a fact, or it may not be a fact that at the time some of the estimates were approved, and warrants finally delivered, a sufficient amount of work and material had not been done and furnished to represent such warrants. **It may even be a fact, or not a fact, whether an election had been held to authorize the issuance of the obligations.** In other words, each and every one of said points raised by the City is in its nature a fact matter. It does not import a total want of power on the part of the City, under any circumstances, to issue these obligations for paving, but imports merely that an existing and undoubted power has been irregularly exercised or exercised under improper circumstances.

This brings us to the important and well established doctrine which is decisive of this case, even if it be assumed that each and every one of the above enumerated defects existed in the proceedings. As we shall show by overwhelming authority, it is sound and settled law that if **under any**

circumstances the City has the general power to issue such obligation for paving, and the City represents that such circumstances in fact exist, and the buyer of the obligations relies upon such representations, the City is estopped to deny the truth of the representations when sued by the buyer.

Before coming to the authorities, let us review the representations made by the City in this case. The City knew that the warrants were to be delivered at Wichita, Kansas, and there paid for by Brown-Crummer Investment Company. The warrants were made payable to Southern Construction Company, its assigns or bearer, and therefore, contemplated on their face that they would pass from hand to hand. In the resolution of December 16th, 1919, the first of the City's proceedings which, according to the evidence, were brought to the knowledge of Brown-Crummer Investment Company, the City represents explicitly that the City Council had theretofore determined the necessity for the street improvements, and had enterd into a contract for same in accordance with the plans and specifications which are recited to be attached to the contract, and that the contract is based on specifications theretofore prepared and approved by he Mayor and City Council, and was let after proper advertisement, as required by law, for not less than ten days, and that the bids

were kept open for public inspection in the office of the Mayor at least forty-eight hours after they were opened, and before the contract was awarded, and that the contractor had given a bond, in accordance with Section 29 of the City Charter. And then the resolution specifically authorized that each of the warrants should carry the following recitations and representations, to-wit:

> "And it is hereby certified and recited that all acts, conditions and things required to be done precedent to, and in the issuance of this warrant, have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that this warrant, does not exceed any constitutional or statutory limitation."

Said resolution further provided that the warrants should be delivered upon estimates accepted by the City after inspection and acceptance of the labor and material performed and furnished by the City Council, and not by the City Engineer. Pursuant to the above authority, the warrants actually issued each carried on their face the representations above quoted. As each of the estimates was later approved on April 6th, 1920, September 21st, 1920, October 5th, 1920, November 2nd, 1920, and November 16th, 1920, a resolution on each of said dates was adopted by the City Council in which it was further represented

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error this 28th day of June, 1926.

F. A. King, Clerk.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Writ of Error. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ..... Deputy.

Citation in Error.

United States of America.

Fifth Judicial Circuit, ss.

The President of the United States,

To Brown-Crummer Investment Co., a corporation, Southern Surety Co., a corporation, and H. O. Head, executor, and Elex F. Wiseberg, F. C. Dillard and John T. Sugg, their attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of Fort Worth, in the State of Texas, in said Circuit, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Texas, wherein the City of Gainesville, a Texas municipal corporation, is plaintiff, and Brown-Crummer Investment Co., Southern Surety Co. and H. O. Head, executor are defendants, to show cause, if any there be, why the judgment rendered

against said the City of Gainesville as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. H. Taft, Chief Justice of the United States, this 28th day of June A. D. 1926, and of the independence of the United States the one hundred and fiftieth year.

W. L. Estes,
United States District Judge.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co., et al. Citation. Filed 28th day of June A. D., 1926. F. A. King, Clerk. By ....., Deputy.

Praecipe for Transcript.

In the District Court of the United States for the Eastern District of Texas, Sherman Division.

***No.* 241.**

City of Gainesville,

vs.

Southern Construction Co., et al.

Mr. F. A. King,
Clerk,

Dear Sir:

Please prepare the record in this case for the Circuit Court of Appeals. You know better than I do the order in which they should be placed, but the following papers should be included in the record:

1. Plaintiff's third amended original petition, filed April 13, 1926.

2. The amended answer of defendant Head, filed May 17, 1926.

3. The first amended answer of Brown-Crummer Investment Company, filed May 17, 1926.

4. The second amended original answer of the Southern Surety Co., filed May 17, 1926.

5. Plaintiff's first amended supplemental petition, filed May 17, 1926.

5½. Defendant Head's supplemental answer, filed May 17, 1926.

6. The agreement and stipulation of the parties, filed June 28, 1926.

7. The verdict of the jury returned May 20, 1926.

8. The judgment of the court rendered May 20, 1926.

9. The bill of exception and addenda thereto, filed June 28, 1926.

10. The petition for writ of error, filed June 28, 1926; and the order endorsed thereon allowing the same.

11. The writ of error.

12. The writ of error bond.

13. The citation in error.

14. The assignment of error.

W. O. DAVIS,
Attorney for Plaintiff.

Endorsed:

No. 241. City of Gainesville vs. Southern Construction Co. et al. Praecipe for Transcript. Filed June 28, 1926. F. A. King, Clerk by J. R. Blades, Deputy.

Clerk's Certificate.

I, F. A. King, clerk of the United States District Court for the Eastern District of Texas, in the Fifth Circuit and district aforesaid, do hereby certify that the foregoing is a full, true and correct transcript of record, bill of exceptions, assignments of error, and all the proceedings in cause No. 241, at law, wherein The City of Gainesville is plaintiff, and the Southern Construction Company, et al., are defendants, as fully as the same remains on file and of record in my office at Sherman, Texas, and that the same constitutes the return to the annexed writ of error and citation in error.

Witness my hand officially, and the seal of the court, at Sherman, Texas, this the 8th day of July, A. D. 1926.

F. A. King, Clerk,
By J. R. Blades, Deputy.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation,

versus

BROWN-CRUMMER INVESTMENT COMPANY et als.

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 9th, 1926

On this day this cause was called, and, after argument by W. O. Davis, Esq., for plaintiff in error, and Alex F. Weisberg, Esq., and F. C. Dillard, Esq., for defendants in error, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation, Plaintiff in Error,

vs.

BROWN-CRUMMER INVESTMENT COMPANY et als., Defendants in Error

Error to the District Court of the United States for the Eastern District of Texas

W. O. Davis (Cecil Murphy on the brief) for Plaintiff in Error.

Alex F. Weisberg (Elcock & Martin; Thompson, Knight, Baker and Harris on the brief), for Defendant in Error, Brown-Crummer Investment Company.

F. C. Dillard (Head, Dillard, Smith, Maxey & Head on the brief) for Defendant in Error, H. O. Head, executor.

John T. Suggs, for Defendant in Error, Southern Surety Co.

Before Walker, Bryan, and Foster, Circuit Judges

OPINION OF THE COURT—Filed July 6th, 1927

FOSTER, Circuit Judge:

The pleadings in this case are too voluminous to be briefly stated. The record is not as clear as it might be but the case shown without serious dispute may be summarized as follows.

In November, 1919, the City of Gainesville, Texas, hereafter referred to as the City, entered into a contract with the Southern Construction Company, hereafter called the Contractor, a partnership composed of Harry D. Levy and Lester Levy, for certain paving and other street improvements. The contract contemplated the City's paying for a portion of the general paving and entirely for the intersections, the City's share being estimated at $50,000.

After some preliminary and supplemental agreements this final result was arrived at. The Contractor agreed to accept warrants, at 5 per cent discount, in amounts of $1,000, maturing March 1, 1921 to March 1, 1940, with interest at 6 per cent, payable semi-annually and evidenced by coupons attached.

The Brown-Crummer Investment Company, hereafter called the buyer, agreed to purchase these warrants when issued and further agreed to print them and to furnish legal advice to the City and supervision of the necessary ordinances, for a further discount of 5 per cent. The warrants up to $47,000 were printed and delivered to H. W. Head, who was in some way interested in the contract, in escrow, and he agreed to indemnify the City on the contract up to $50,000, and furnished the Southern Surety Company, hereafter called the Surety Company, as guarantor for his undertaking.

From time to time as the work progressed the city council adopted ordinances purporting to approve estimates of the engineers covering the work completed, retaining 10 per cent and authorizing the issuance of warrants to

cover same. Head drew drafts on the buyer with the warrants and certified copies of the ordinances attached, and these drafts were paid. Six of the warrants have been paid by the City and the City also from time to time remitted the additional 5 per cent discount to the buyer. The warrants were in form as follows:

Number —, $1,000.00

"UNITED STATES OF AMERICA,
"State of Texas, County of Cook:

"City of Gainesville Street Improvement Warrant, Series A 1

"This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to the Southern Construction Company, Contractor, their assigns or bearer, on the first day of March, 1921, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, One Thousand Dollars in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the first day of March, 192- and semi-annually thereafter on September 1st and March 1st of each year and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest thereon, evidenced by coupons attached hereto principal and interest payable at the place above named upon presentation and surrender of warrant or proper coupon.

"This Warrant is one of a series of Fifty (50) warrants, numbered consecutively from One (1) to Fifty (50) inclusive, in the denomination of One Thousand Dollars ($1,000.00) each aggregating the sum of Fifty Thousand Dollars ($50,000.00), issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer, for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20th, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and Laws of the State of Texas, and

pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 16th day of December, 1919, recorded in Book 6, at page 583, et seq. of the Minutes of said City Council.

"The date of this warrant, in conformity with the ordinance above mentioned, is November 20th, 1919.

"And It Is Hereby Certified and Recited that all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

"In Witness Whereof, the City of Gainesville has caused this corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor and countersigned by its City Secretary, and registered by the City Treasurer as of the date last above written.

"E. N. Blackburn, Mayor City of Gainesville, Texas.

"Countersigned: S. A. Bryan, City Secretary, City of Gainesville, Texas.

"Registered this the 27th day of April, 1920.

"R. R. Hullett, City Treasurer, City of Gainesville."

Before the paving was completed the work on two streets was stopped by an injunction secured by a taxpayer. Thereafter the contractor offered to do paving on other streets but nothing came of this offer. The warrants, however, had all been issued and had been paid for by the buyer. In October, 1921, suit was brought by the City in the District Court of Cook County, Texas, against the contractor, H. W. Head, and the Surety Company, to recover the difference between the warrants issued and the work done, alleged to be about $15,000. The City at that time apparently had no thought of contesting the validity of the warrants and did not include the buyer in the suit. A default judgment was rendered in favor of the City against the contractor for $4,090 and against the other two defendants for $15,000. On appeal this was affirmed as to the contractor and reversed as to Head and the Surety Company by the Court of Civil Appeals for the Sixth Supreme Judi-

cial District, 254 S. W. 323. The reversal was on the ground that the petition showed no cause of action against Head and the Surety Company. The validity of the warrants was not considered.

On the remanding of the case to the District Court the City filed an amended petition making the buyer a party defendant. The buyer removed the case against itself to the United States District Court for the Eastern District of Texas as a separable controversy and a motion to remand was denied. Thereafter, the City recast its pleadings and again made the Surety Company party defendant, and, as H. W. Head had died in the meantime, H. O. Head, his executor, was brought in. The contractor was omitted from the suit. In the petition in the Federal Court the City prayed for a judgment against the buyer declaring the warrants void and for an injunction restraining their sale or other disposal, and prayed for judgment against the other defendants in the sum of $15,264.71. The buyer set up a counterclaim in the answer and prayed for judgment against the City on the warrants and coupons then due and unpaid. Notwithstanding the prayer for equitable relief the case was tried to a jury and at the conclusion of the evidence the Court directed a verdict in favor of the buyer in the amount of $13,125, and rejected the claim of the City against H. O. Head, executor, and the Surety Company. There are numerous errors assigned but those running to the direction of the verdict are the only ones that need be considered.

The case presents an anomaly in pleading and practice, but applying the remedial provisions of section 269 J. C. as amended (40 Stat. 1157) we may consider it on this writ of error. The court was without jurisdiction as between the City and Head, executor, and the Surety Company, as the case had not been removed as to them and there could be no jurisdiction, as between the City and Head, both being citizens of Texas, in any event. But that could not affect the jurisdiction as to the buyer and in view of the result we may dismiss those two defendants from further consideration.

The City contends that the instruments in suit are in fact bonds and not warrants and are void because not issued in conformity with the City charter and the laws of Texas and

also relies upon certain irregularities in the awarding of the contract and the issuing of the warrants.

The charter of the City of Gainesville was granted by a special act of the Texas Legislature, approved March 17, 1909, which act contains the recital that it shall be considered a public law of Texas, and thereafter, within the same year, was adopted by a vote of the people. Under its general powers the City has full authority to contract; to grade, pave and otherwise improve its streets, and to levy annually for general purposes and for paying its bonded indebtedness ad valorem taxes on all real, personal and mixed property within the territorial limits of the City. The charter contains these specific provisions:

"The specification of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the state of Texas, or by the provisions of the Constitution of the State of Texas."

"The provisions of this act shall be liberally construed with a view to carry out the purposes of this charter and in case of doubtful construction, it shall be resolved in favor of the city."

Section 1, article 4 of the charter provides that the City shall have the authority by ordinances duly passed to borrow money for permanent improvements, including paving and re-paving of the streets, and may issue bonds for that purpose in amounts not exceeding $150,000 in any one year, subject to approval by the taxpayers at an election held for that purpose if the amount exceeds $2,500; requires that provision be made at the same time to assess and collect annually a sufficient sum to pay the interest on the bonds and to create a sinking fund of at least 2 per cent; that the bonds shall not pay more than 5 per cent interest and shall be invalid if sold for less than par and accrued interest.

The laws of Texas provide for submission to the taxpayers of a proposition for the issuance of bonds by a city;

that bonds can have no validity unless approved by the Attorney General; and that said bonds must be registered by the Comptroller. R. S. 701-709-710.

If the instruments in suit were to be classed as bonds there could be no doubt of their invalidity but they are not to be so considered. It was not contemplated that the warrants should be issued for the purpose of borrowing money. It was the intention of all parties that they should be issued in payment for work actually done in paving and otherwise improving the streets under the general powers of the City and the fact that they were payable in future years would not render them invalid. It is not shown that the City would not have sufficient funds for general purposes for the years in which the warrants fall due, nor that the taxes assessed would exceed the legal limit imposed upon the City. The distinction between bonds and warrants issued by Texas municipal corporations has been repeatedly recognized by the courts of that state. The provisions of the charter and the Texas law as to bonds do not effect the authority of the City to issue warrants to be paid out of current revenue in the future. Lasater vs. Lopez, 217 S. W. 373; City of Tyler vs. Jester & Co., 97 Texas 344; Bridges vs. City of Lampasas, 249 S. W. 1085.

As affecting the validity of the obligations as warrants the City contends that the paving contract and all the proceedings relating thereto are void because estimates of the cost, and plans and specifications for the proposed work, were not approved by the council before advertising for bids; that the contract as let was different from the bid and less burdensome; and that the contract provided that preference be given to citizens of Texas and Gainesville; and that in some instances estimates of the work completed were not in fact made before the ordinances approving them were adopted. Perhaps these irregularities might have been urged by a taxpayer or an unsuccessful bidder in a suit to enjoin the letting of the contract or to prevent the prosecution of the work, on showing fraud or damage to the City, but after the contract was let and the work completed it is doubtful that the City could urge them against the contractor. The City also contends that there was a failure of consideration. It seems to be agreed between the parties that the amount of work not done under the con-

fract amounted to about $15,000. It is difficult to reconcile this with the fact that when the contractor was sued in the state court the recovery was only about $4,000, but assuming that the deficiency in work done was approximately $15,000, still the City had ample security for that amount.

It is unnecessary however to consider the objections to the warrants above made. The City had the capacity to issue and sell the warrants. Recitals in warrants or other evidences of debt issued in payment of the obligations of a city are made for the purpose of inducing the purchase of the instruments and are binding upon the municipality in the absence of fraud or knowledge on the part of the purchaser of facts that show the invalidity of the warrants.

It is true that a Mr. Blaine represented the buyer initially in negotiating the purchase of the warrants and attended some of the meetings of the council and that Mr. Wm. M. Harris, a well known and reputable attorney of Dallas, also represented the buyer in preparing the ordinances for the adoption of the council and supervised to some extent the subsequent proceedings, but it is not shown that either of these men had any knowledge of any irregularities in the letting of the contract or in the doing of the work or the adoption by the council of estimates, and it is shown without contradiction by the testimony of Mr. Crummer, who represented the buyer in the final purchase of the warrants, that he had no knowledge of any of the irregularities now urged and relied entirely on the recitals in the warrants in buying them.

In this case the City is clearly estopped to urge the irregularities above mentioned and the partial failure of consideration, and it is immaterial that the warrants were sold at a discount. City of South Houston vs. Carman, 6 F. (2d) 358; Slayton & Company vs. Panola County, 283 Fed. 330; Scott County vs. Advance Rumley Thresher Co., 288 Fed. 739; Grimes County vs. W. L. Slayton & Co., 262 S. W. 209; Evansville vs. Dennett, 161 U. S. 434; City of Belton vs. Brown-Crummer Investment Co., 17 F. (2d) 70.

From the above the conclusion reached is that reversible error is not shown in the direction of the verdict in favor of Brown-Crummer Investment Company and to that extent the judgment is affirmed. The case is remanded with

instructions to dismiss the proceedings as between the City and Head, executor, and the Surety Company. And for such other proceedings as may be necessary, not inconsistent with this opinion.

Affirmed in part, reversed in part.

JUDGMENT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation,

versus

BROWN-CRUMMER INVESTMENT COMPANY, et als.

Extract from the Minutes of July 6th, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be and the same is hereby, affirmed to the extent of the direction of the verdict in favor of Brown-Crummer Investment Company, and that said cause be, and the same is hereby remanded to the said District Court with instructions to dismiss the proceedings as between the City of Gainesville and H. O. Head, executor, and the Southern Surety Company, and for such other proceedings as may be necessary, not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the plaintiff in error, City of Gainesville, a Texas Municipal Corporation, and the sureties on the writ of error bond herein, H. F. Smith, G. W. Brown, J. B. Tanner, Ed Nelson and A. M. Bell, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

MOTION AND ORDER STAYING MANDATE—Filed July 15th, 1927

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, Plaintiff in Error,

vs.

BROWN-CRUMMER INVESTMENT COMPANY et al., Defendant in Error

Application for Stay

To the judges of said Court:

The City of Gainesville, plaintiff in error, respectfully alleges that it will endeavor to have this cause removed to the Supreme Court of the United States by certiorari and will prepare the petition and other procedure as speedily as possible. The judgment bears interest at the rate of six per cent per annum and is secured by writ of error bonds in more than double the amount of the judgment and no possible injury can result from a stay. Wherefore plaintiff in error prays for an order staying the execution of the judgment for the period of three months from July 6, 1927.

(Signed) Cecil Murphy, W. O. Davis, Attorneys for Plaintiff in Error.

Order

Considering the foregoing petition, it is ordered that the mandate in this cause be stayed until September 1st, 1927, upon plaintiff in error giving bond in the sum of three thousand ($3,000.00) dollars to afford the plaintiff in error an opportunity to file in the Supreme Court of the United States a petition for a writ of certiorari, and that in the event that said petition be filed within the above time, then it is still further ordered that the mandate in this cause do not issue until the Supreme Court of the United States passed upon said petition for a writ of certiorari.

New Orleans, Louisiana. July 14th, 1927.

(Signed) Rufus E. Foster, U. S. Circuit Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4861

CITY OF GAINESVILLE, a Texas Municipal Corporation, Plaintiff in Error,

versus

BROWN-CRUMMER INVESTMENT COMPANY et al., Defendants in Error

BOND ON CERTIORARI—Filed July 25th, 1927

Know all men by these presents:

That we, City of Gainesville, a Texas Municipal Corporation, as principal, and Roy T. Potter and J. W. Gladney, as sureties, are held and firmly bound unto Brown-Crummer Investment Co., Southern Surety Co., and H. O. Head, executor of H. W. Head in the full and just sum of three thousand ($3,000.00) dollars to be paid unto the said Brown-Crummer Investment Co., and various others as stated above, their successors and assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and firmly by these presents.

Sealed with our seals and dated this the — day — July, A. D. 1927.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit, in the above suit pending in the said United States Circuit Court of Appeals, wherein the City of Gainesvile, a Texas Municipal Corporation, was plaintiff in error, and the Brown-Crummer Investment Company, and others, were defendants in error, a decree was rendered against the said City of Gainesville, a Texas Municipal Corporation, and the said plaintiff in error has this the 15th day of July, A. D. 1927, obtained a stay of the mandate of the said United States Circuit Court of Appeals in the above entitled and numbered cause until the first day of September, A. D. 1927, to enable plaintiff in error to apply for and obtain a writ of certiorari from the Supreme Court of the United States to the said United States Circuit Court of Appeals;

Now, therefore, the condition of this obligation is such that if the said City of Gainesville, a Texas Municipal Corporation, fails to make application for such writ on or before September 1st, 1927, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court, it shall answer for all damages and costs which the said Brown-Crummer Investment Co., and others, may sustain by reason of the stay, otherwise this obligation shall be null and void.

City of Gainesville, a Texas Municipal Corporation, by (Signed) Frank R. Stanford, Mayor. (Signed) J. W. Gladney, Roy T. Potter, Surety.

Approved: (Signed) Rufus E. Foster, U. S. Circuit Judge.

THE STATE OF TEXAS,
County of Cooke:

I, Tom J. Midkiff, Clerk of the District Court for Cooke County Texas, do certify that I am well acquainted with Roy T. Potter and J. W. Gladney, the sureties on this bond. They are engaged in the banking business and are solvent and responsible. Each of them owns unencumbered property subject to execution of a value many times exceeding the said bond.

Given under my hand and seal of office, this the 18th day of July, 1927.

(Signed) Tom J. Midkiff, Clerk of the District Court for Cooke County, Texas. (Seal.)

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 286 to 302 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered

4861, wherein the City of Gainesville, a Texas Municipal Corporation, is plaintiff in error, and Brown-Crummer Investment Company et al., are defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 285 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of July, A. D. 1927.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8364)